159 U.S. 40

692 159 U.S. 40

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK

Horne v. Smith } 341

Motion to dismiss

IN THE

Supreme Court of the United States

October Term, 1893.

CHARLES W. HORNE, PLAINTIFF IN ERROR,

vs. } No. 672.

C. A. AND R. T. SMITH, DEFENDANTS IN ERROR.

Now comes the plaintiff in error by H. Bisbee, his attorney, and moves the court to continue the motion to dismiss the writ of error in this case made by defendant and now pending, until the second Monday in October, 1894. This motion to continue the motion to dismiss is based on the following ground, to wit:

The plaintiff in error is traveling abroad. The last time his representative in Ohio heard from him he was in Asia. Neither his representative in Ohio nor his attorney in this action knows where the plaintiff is now, and cannot communicate with him.

One of the grounds to dismiss the writ of error is that the property in controversy does not exceed the value of $5,000. The plaintiff is familiar with the value of the property in controversy, and knows to whom to apply for evidence of such value, and neither his attorney or his representative in Ohio has any accurate knowledge on that subject and does not know to whom to apply for information as to the value of the property in controversy; and the plaintiff's presence and advice and direction is essential in the premises.

Also comes the plaintiff in error and moves to amend the writ of error in this action so as to supply the defect that it was not under seal. These motions are based upon the affidavit of H. Bisbee, attorney for plaintiff in error, in the appendix to plaintiff's brief.

To Oscar Foote, Esq., Counsel for Defendant in Error:

Please take notice that on Monday, the 9th day of April, A. D. 1894, at the opening of the court, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the court thereon.

State of Florida,

County of Duval.

I solemnly swear that on the.....day of March, 1894, I mailed, duly postpaid, a copy of the foregoing motions, together with the points of argument, addressed to Oscar Foote, Esq., 1406 G Street, N. W., Washington, D. C.

BRIEF FOR PLAINTIFF IN ERROR ON THE FOREGOING MOTIONS AND IN RESISTENCE OF THE MOTION OF DEFENDENTS IN ERROR TO DISMISS THE WRIT OF ERROR.

Points and Authorities:

1st. The first ground stated for the dismissal of the writ of error is that it was issued before the judgment was rendered. According to the printed transcript of the record this would be true. According to such transcript the judgment was entered on the 30th day of June, 1891, and the writ of error was issued on the 8th day of the same month and year. The date of the judgment in the printed transcript is not correct. The actual date of the judgment is the 30th day of May, 1891, nine days before the writ of error was issued. This will appear in a transcript of the judgment in an appendix attached to this brief. The error in the date of the judgment is that of the clerk who made up the record,

which seems to have escaped the attention of counsel. We ask that the original of the supplemental transcript be filed and considered as a part of the transcript in this action.

2d. The second ground for dismissal of the writ is that the bill of exceptions was not settled or filed during the term. In answer to this objection we say the fact is the bill of exceptions was made and settled a short time after the verdict and during the month of January, and left with the trial judge at his chambers for his signature.

That the said judge was absent the greater portion of the months of February and March, holding court at Tallahassee and Pensacola, Florida. Whether or not the bill of exceptions was actually signed before the 18th day of May, counsel cannot state. On the night of the 18th of May, 1891, the Federal Court rooms in Jacksonville and all the records and files of the court in all cases then pending or which had ever been pending in the Circuit Court of the United States at Jacksonville, were entirely destroyed by fire, except portions of the files in one or two cases which his Honor, Judge Pardee, had under advisement in New Orleans. The record was re-established in accordance with the law. Another bill of exceptions was prepared and submitted to counsel on the other side; the bill of exceptions was amended in accordance with the suggestion of counsel for defendants, and left with the trial judge for signature. The trial judge was absent from the State a greater portion of the time from the middle of June until October, but the court was regularly adjourned from time to time from the first Monday in December, 1890, the date fixed by law for holding it, until the 31st day of October, 1891. This will appear by the supplemental transcript of the record in the appendix The bill of exceptions shows on its face that the exceptions were duly taken at the trial, and the fact that they were not signed until the 30th day of October, 1891, is not the fault of the plaintiff or his counsel.

Appellant cannot be prejudiced by the failure of the judge to sign the bill.

Davis vs. Patrick, 122 U. S., p. 139.

The affidavit of H. Bisbee and letter of defendant's counsel attached shows that the delay was consented to by them.

Thus the second ground to dismiss the writ is removed, provided the court below has power to adjourn beyond the time for holding the term at Tallahassee, which begins on the first Monday in February, and at Pensacola, which begins on the first Monday in March. Attorney for plaintiff here states that it has been the custom of the Circuit Court for the Northern District of Florida for twenty-five years to adjourn the court from time to time, and thus keep it open during the greater portion of the year. In the meantime, court is held at Tallahassee and at Pensacola. It is the same court and has jurisdiction over the same territory, whether sitting at Jacksonville, Tallahassee or Pensacola. The point made by the defendant's attorney is that the court has no power to adjourn beyond the time for its regular term at Tallahassee or Pensacola. If this position is sustained, then the logic of defendant's position is that the court was not legally in session on the 30th day of May when the judgment was rendered. Consequently there is no final judgment in the case.

Defendants did not raise this question in the court below.

If the contention of the defendants is sustained that all the proceedings of the court had after the time for holding court in Tallahassee are void very serious consequences follow. Many persons who have been convicted of crime must be set free, and many civil causes that have been tried and judgments and decrees rendered are still pending, and will have to be tried again. The time of counsel for plaintiff in this cause to prepare brief is so limited that he is unable at present to cite any authorities to aid the court in solving this problem, but he begs to say that the decisions in the State Court do not apply. The facts are altogether different. State Courts of original jurisdiction are organized for each county. The records of each county are separate and distinct. The statutes of the State fix the time that the term in each county shall com-

mence, and the decisions of the State courts that the court cannot be adjourned in one county beyond the time fixed by statute to be held in another county do not control the question here presented.

If a State law provide for the court to be held in different places in the same county, such a case would be analagous. Here the Circuit Court of the United States is organized for certain territory——the Northern District of Florida. The statute fixes the time and place for three terms of court. But inasmuch as the jurisdiction of the court extends throughout the whole Northern District of Florida, no matter where the court is held, and no matter in what portion of the district the defendant resides he may be sued at any place where the court is held, we can discover no reason why the court at Jacksonville cannot be adjourned from time to time and be legally in session up to the day before that fixed for the next term at Jacksonville.

3d. The third ground for dismissal of the writ of error is that the bill of exceptions was signed subsequent to the issuing of the writ and citation. This point has been expressly overruled more than once by this court. This precise point was made, considered and overruled in the case of Hunnicut vs. Payton, 102 U. S. Rep., 333. The objection is no ground to dismiss the writ. The only question is whether or not the bill of exceptions can be considered at the trial on the merits.

4th. The fourth ground for dismissal of the writ is that it was not under seal. This defect is amendable under Section 1.005 of the Revised Statutes. This writ of error was issued a short time after the destruction of the seal of the court by fire, and at the time it was issued the clerk had no seal.

See affidavit of clerk in appendix.

If the court denies the motion to continue the motion to dismiss, we submit the following:

5th. The fifth and last ground for dismissal of the writ of error is that the value of the property in dispute does not exceed $5,000. The plat in the record (pp. 12 and 13), from the General Land Office, shows that the property involved in the suit was lot 7, section 23, and lots 1 and 2, section 26, township 29 south of range 38. The plaintiff, by his declaration and by the evidence, claimed all the lands embraced in lots 7, 1 and 2 from the eastern boundary line of the said sections to the Indian River. Under Section 1,513 of the Revised Statutes of the State of Florida, a defendant in ejectment may deny possession by special plea. Such special plea was interposed in this case by the defendants. The declaration averred that the defendants were in possession of a certain tract of land describing it according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General.

Record, page 13.

The defendant's plea avers substantially that they are not in possession of any of the land described in the declaration.

Record, page 3.

Thus the possession of the entire tract of land embraced in the three lots according to the official survey was put in issue. This was the only issue tried by the jury. Certain other pleas numbered 2, 3, 4 and 5 were interposed by defendants but stricken out on motion of plaintiff; but were put in evidence by the plaintiff by reason of certain admissions therein contained, and are found in the record on pages 22 to 24 inclusive.

The judgment was for defendants, and the necessary result is a judgment that the defendants are not in possession of *any* of the land described in the declaration. It is true that at the trial the defendants sought by evidence to show that the plaintiff's western boundary line was the meander line of the United States surveyor, and not Indian River, and that there was several hundred acres of land between such mean-

der line and the waters of the Indian River which did not pass by the patent.

The defendant's third plea, page 23 of the record, alleges that there is about six hundred acres to the west of the line which belongs to the plaintiff which appears as water upon the plat under which plaintiff claims. While it is true that at the trial the defendants did not claim to be in possession of any of the lands claimed by the plaintiff, except that between the meander line and the waters of the Indian River, yet the plea put in issue the possession of all the land claimed by the plaintiff, as well that east of the meander line as that west of it, and, as stated, the verdict was for the defendant on that issue; and the consequences of the judgment are that the plaintiff is not in possession of any of the land, and that the plaintiff has no title to any of it.

It is this judgment plaintiff seeks to have reversed. The question then arises what property was in controversy. We do not see how the conclusion can be avoided that all the property affected by the judgment is in dispute in this court, for if this judgment stands it is necessarily an adjudication that at the time suit was brought the defendants were not in possession of any of the tract of land embraced within the boundary lines of the three lots in question. The western boundary line of this land was the waters of the Indian River. This has been repeatedly decided by this court. That is to say, the meander line is not run as a boundary line at all, and that notwithstanding the meander line, the boundary is the waters of the river in this case. Also that the plot referred to in the patent becomes a part thereof, and is as effectual to fix the boundary as if incorporated into the patent.

Lindsey vs. Howes.
2d Black, 554.
7th Wall, 272.
8th Wall, 337.
3d ~~Horne, 650~~ Howard, 650
Cragin vs. Powell, 128th U. S., 691.

The official survey is obligatory on the court, and its correctness cannot be questioned by the court. 128th U. S., 691.

This court's judgment on these questions was overruled by the court below.

Record, p. 26.

DEFENDANT'S POSSESSION.

It will be observed that the defendants admit that they are in possession of the land between the meander line and the river. See their pleas numbered 2, p. 22, and 4 and 5, page 24.

Also the affidavit of one of the defendants, page 13, of brief of defendants in error.

The ground upon which defendants claimed they were not in possession was because the part that they were actually in possession of, to wit: The land between the meander line and the river, was not the property of plaintiff. And the court below in its instructions to the jury sustained the defendant's contention, and said that the rule declared by the Supreme Court of the United States—that the boundary line extended to the river, and that the patent carried the title to all the land included in the plat referred to therein—did not apply to this case because of the large area of land between the meander line and the river.

See instructions to the jury. Record, p. 26.

Interior Department decided in 1889 that the lands occupied by defendants were not unsurveyed, and had all been disposed of.

Record, p. 14.

VALUE OF LAND IN CONTROVERSY.

The plat in the record shows that in the three lots according to the government survey limiting the area to be paid for to the meander line, contained 170.49 acres. That is 73.6 acres in lot 7; 54.91 acres in lot 1; 42.53 acres in lot 2; of

which thirty acres from the northern end of lot 7 had been sold before the conveyance to plaintiff.

See deed to plaintiff. Record, p. 7.

Now, if all the land claimed by the plaintiff (that is including that east as well as that west of the meander line), is in dispute, as we contend it is under the pleadings, then it is very clear that its value exceeds $5,000. The deed to the plaintiff shows that he paid $2,500. The price paid is property to be considered.

May vs. Sloan, 101 U. S., 231.

This deed was made to him on the theory that his grantor only owned 140 acres. That is, there were but 170 acres between his eastern boundary and the meander line, of which thirty acres had been sold. Now, defendants admit in their third plea, record, page 23, that there is about six hundred acres between the meander line and the river. The affidavit of Birchfiel, County Surveyor, page 8 of defendant's brief, says that there are about three hundred and sixty acres of land between the meander line and the margin of the river; and of this about one hundred acres is good land, worth $30 per acre. The other affidavits in defendant's brief admit this one hundred acres of good land west of the meander line is of the value of $3,000. Assuming that the one hundred acres of high and dry land east of the meander line is of the same value per acre as that west of the meander line, to wit: $30 per acre, the value of the high and dry land embraced within the controversy would exceed $7,000 independent of any claim for damages or mesne profits. Even if the one hundred and forty acres east of the meander line is excluded and considered not in dispute under the pleadings, the amount in dispute would still exceed the jurisdictional amount. It is conceded that the one hundred acres of high land west of the meander line is worth $3,000, and the remainder of it is worth $1 per acre, of which there are five hundred acres according to the defendant's pleas which were sworn to. Defendant's fifth plea, page 24, alleges that the improvements they have made

on the land are worth the sum of $2,000. Thus upon defendant's own admissions the value of the land west of the meander line would exceed $5,000.

RECORD SHOWS JURISDICTIONAL AMOUNT WITHOUT EVIDENCE ALIUNDE.

The declaration, page 3 of the record, claims profits and damages to the amount of $1,200 annually, and alleges that the defendants in possession since the 1st day of January, 1887. The verdict was rendered January 14, 1891. It was, therefore, possible and within the bounds of probability that the plaintiff could have recovered damages to the amount of at least $4,800. This, with the $2,000 admitted by defendants to be the value of the improvements on the lands, exceeds the jurisdictional amount omitting the value of the land itself. Where the record shows the jurisdictional amount and there was no controversy about it in the court below, affidavits will not be admitted to contradict or vary the value of the property as stated in the record.

Richmond vs. City of Milwaukee, 21 How., 391.

Under the statutes of Florida the plaintiff in ejectment can recover the premises and also rental value, waste and other damages sustained.

The common law action of trespass for damage and mesne profits is not necessary as it was at common law after judgment in ejectment.

Ashmead vs. Wilson, 22 Fla. Rep., 256, 262.

It is obvious that the amount of the money judgment which the plaintiff could recover does not depend upon the rental value of the land. He can recover for any waste committed, such as the destruction of timber; and the defendants admit in their pleas that they have made improvements upon the land and cleared portions of it for cultivation, and necessarily they have destroyed the timber thereon. Defendant's contention is the plaintiff offered no evidence touching the matter of profits or damages. Under the issue tried such

evidence was inadmissible. The defendants did not by their pleas deny their liability to damages, nor did they deny that the profits were annually worth $1,200 as alleged in the declaration. A plea of not guilty would have put this question in issue, but the plea of not in possession did not. These facts stated in the declaration not being put in issue are admitted by the defendants, and the result is that the court cannot say that the amount claimed for profits and damages is not made in good faith, for so far as the record discloses, the plaintiff might have recovered them. If he had recovered a verdict he might have recovered all the damages he had sustained. The defendant is not in a position to contend that the amount demanded was not made in good faith when, by his pleading, he has admitted the amount of the damages as claimed by plaintiff. And we understand the decision of this court to be that where it appears from the whole record under any aspect of the case, that the plaintiff could recover the full amount of his claim, the court will not decline jurisdiction. It is the amount of the plaintiff's claim that is the test of jurisdiction, where judgment goes for the defendant.

141 U. S., 206.

SECTION 691 OF THE REVISED STATUTES REPEALED.

We further contend that the statute limiting the jurisdiction of this court to cases involving over $5,000.00 has been repealed by the Act of March 3d, 1891. This court has so decided in the case of National Exchange Bank vs. Peters, 144 U. S., p. 570.

The repeal took effect upon the approval of the Act of March 3d, 1891. It necessarily follows we think, that since the approval of the Act of March 3d, 1891, the only limitation as to the amount involved is in that act itself. The concurrent resolution of March 3d, says that nothing in said Act shall be held or construed in any way to impair the jurisdiction of the Supreme Court in respect to my case wherein the writ of error or appeal shall have been sued out or taken to

said court before the first day of July, 1891. One of the objects of this concurrent resolution was to give the litigant the right to bring his case to this court until the United States Circuit Courts of Appeals should be organized, and it was assumed that they would be organized by the first day of July. Between the date of approval of the Act of 1891, which repealed the $5,000.00 limitation to July 1st of that year, any suit could be taken to this court by appeal or writ of error from the Circuit Court, of which the latter court had jurisdiction. That is to say, section 691 of the Revised Statutes being out of the way, there was no limitation as to the amount involved. This construction does not *impair* the jurisdiction of this court, but sustains it. We can discover no reason for the contrary contention. The obvious intention of Congress was to declare that there should be no limitation as to amount except as found in the said Act of March 3d, and that the former limitation of $5,000.00 should cease to exist on the approval of the Act and not on the first day of July.

GRANTING TIME TO PRESENT PROOF OF VALUE.

It has been rule of this court to grant time to a party to prepare and present affidavits of value of property in dispute, when the trial of the cause will not be delayed and no injury will result to his adversary.

Rush vs. Parker, 5 Ct., 287.

The Grace Girdlet, 6 Wall, 441.

APPENDIX.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1893.

CHARLES W. HORNE, PLAINTIFF IN ERROR,
vs.
C. A. AND R. T. SMITH, DEFENDANTS IN ERROR. } No. 672.

Personally appeared before me, Philip Walter, Clerk of the United States Circuit Court for the Northern District of Florida, H. Bisbee, who being duly sworn, deposes and says:

That the plaintiff in this action is beyond the seas; that when last heard from he was in Asia. This deponent does not know when plaintiff will return, but he believes that he will return before the next term of this court. This deponent says that he has no correspondent residing near the land in controversy in this State, to whom he can apply for evidence as to its value, and has no personal knowledge of its value; that at the time this writ of error was issued in this case, this deponent had an interview with the plaintiff and was assured by plaintiff that the value of the property in dispute exceeded $5,000.00 and that he could establish, by competent evidence, his claim that the property exceeded in value the sum of $5,000.00. Deponent says that he does know that the land is very favorably located. It is between the Indian River aud the Atlantic Ocean, forming a part of a narrow strip of land that is very favorably located for many purposes. It is favorable for tropical and semi-tropical fruits because the atmosphere is tempered by the waters of the Atlantic Ocean and Indian River, and thus largely protected from frosts. The value of the land is not limited to the mere purpose of cultivating vegetables, which the defendants have been engaged in, bnt it is especially valuable for tropical fruits, and especially for cocoanut trees, which are more successfully grown where their roots will reach salt water, than anywhere else, according to the knowledge and information of this deponent. Deponent verily believes that the presence of the plaintiff is necessary to enable him to obtain evidence to establish that the value of the land in dispute exceeds the sum of $5,000.00. The plaintiff has been on the land and is familiar with its value and knows to whom to apply for such evidence, and this deponent does not know.

This deponent further says with reference to the bill of exceptions in this case, that he. himself, prepared the bill of exceptions within a very few days after the verdict was rendered, which was on the 14th day of January, 1891, and that a copy thereof was submitted to the defendants' attorneys of

record who suggested amendments thereto, which amendments were made, and the bill of exceptions was left with the trial judge at his chambers in Jacksonville for signature. Whether or not, the said judge signed the bill of exceptions before the 18th of May, 1891, deponent does not know. On the night of the 18th of May, 1891, the Federal Court House at Jacksonville and all the records thereof and the seals of the courts, district and circuit, and all the pleadings and files of every case then pending or which before that time had been tried and determined, were entirely destroyed by fire, except parts of the record in two or three cases which his Honor, Judge Pardee, had under advisement at New Orleans. Soon after the said fire this deponent prepared another bill of exceptions and copies of the pleadings and the record were re-established in accordance with law. This second bill of exceptions was also submitted to the counsel of record for defendants, and was satisfactory to them and they consented thereto. By letter, under date of August 6th, 1891, from Messrs. Robbins & Graham, defendants' attorneys, to Messrs. Bisbee & Rinehart, of which latter firm, deponent is the senior member, which is attached to this affidavit, it will be observed that the defendants requested the record in this case to be sent to them and that they would examine it and consent to its re-establishment. The record and the bill of exceptions was sent to them accordingly and was returned without objection. Soon after the date of this letter of August 6th, the Federal Court at Jacksonville adjourned until the early part of October, as will be seen by the supplemental transcript, made a part of plaintiff's brief in this case. No formal order was entered in this case extending the time to prepare bill of exceptions, for the reason that it was understood by counsel on both sides that the court would not finally adjourn until some time in the fall of 1891 and that the judge could sign the bill of exceptions whenever it was convenient for him. And the supplemental record referred to shows that that the bill of exceptions was signed before the final adjournment of the term.

This deponent further says that the trial judge, to wit: Hon. Charles Swayne, was absent from the State of Florida from about June 10th to the early part of August, and from the early part of August to the early part of October, 1891; that the time for filing the transcript of the record of this court was duly extended, according to law, as will appear by orders of the trial judge on file in this court in this cause.

Deponent further says that the Circuit Court of the United States for the Northern District of Florida, was duly opened and held on the first Monday in December, 1890, and was continued in session by adjournment from time to time, to the 30th day of May, when the judgment in this case was rendered, and was continued in session, by adjournment from time to time, from the 30th day of May to the 31st day of October, 1891. Deponent says that it has been the uniform custom for twenty-five years for said court at Jacksonville to adjourn the latter part of February to some day beyond the time when the regular term of the said court commences at Tallahassee and Pensacola, and after the business at Tallahassee and Pensacola is transacted the court resumes transaction of business at Jacksonville. Deponent says that the defendants never at any time suggested that the court was not legally in session, and in fact had their judgment entered up in this case on the 30th day of May of said year.

Deponent further says in respect to the alleged absence of the seal to the writ of error, that the seals of the court were destroyed by fire; that the clerk of said court found the die of the seal of the Circuit Court, and for some time issued writs by placing the paper on the die and rubbing it with some hard substance, and succeeded in making a faint impression of the seal on the paper. Whether, or not, the clerk attempted to attach the seal in this manner to the writ of error in this case, deponent does not know, but attaches hereto the affidavit of the clerk himself on that subject.

Subscribed and sworn before me this 28th day of March, A. D. 1894.

P. WALTER, Clerk. H. BISBEE.

[Copy.]

TITUSVILLE, FLA., August 6, 1891.

Messrs. BISBEE & RINEHART, Jacksonville, Fla.:

Gentlemen:—I have been away and could not answer your letters sooner. I thought it was all understood about the record in the case of Horne vs. Smith. I wrote on your draft of the record my recollection of Smith's testimony and also of the judge's charge. If you will look through your own papers you will find this mem. I expect you to incorporate these in your bill of exceptions, and when completed, to send the record to us and we will O. K. it and consent to its re-establishment. I see no necessity for going to Jacksonville.

Yours truly, ROBBINS & GRAHAM.

Dic. by R.

SUPREME COURT UNITED STATES, OCTOBER TERM, 1893.

CHARLES W. HORNE, PLAINTIFF IN ERROR,
vs.
C. A. & R. T. SMITH DEFENDANTS IN ERROR. } No. 672.

Personally appeared before me, Philip Walter, Clerk, who being duly sworn, deposes and says:

That all of the records, papers and files of court and the seals of the district and circuit courts of the United States for the Northern District of Florida, at Jacksonville, were destroyed by fire on the night of the 18th of May, 1891.

That after said fire he found the die of the circuit court seal among the ruins, and for some time after said fire, this deponent issued writs of the circuit court and made an impression of the die on the writs by placing the paper over the same and rubbing the reversed side with some hard substance. And this deponent says that his recollection is that he made the impression of the seal upon the writ of error issued in this cause in that way; and further deponent saith not.

Subscribed and sworn to before me this 28th day of March, A. D. 1894.

O. J. SUMMERS, Notary Public. P. WALTER.

SUPPLEMENTAL TRANSCRIPT.

TUESDAY MORNING, May 19, 1891.

Court met pursuant to adjournment, at the room of the room of the Criminal Court of Duval county, and was formally opened by the crier.

Present, the Hon. Chas. Swayne, District Judge; Jos. N. Strippling, U. S. Attorney; E. C. Weeks, Marshal; Philip Walter, Clerk.

His Honor, Judge Swayne, announced that as all the books and records of the court had been destroyed by fire last night, he had met this morning for the purpose of keeping the adjournment regular, and to hear any suggestions that the bar might desire to make, and to make such orders as may be necessary to procure books, etc., to conduct the business of the court.

* * * * * * *

Ordered that this court do now adjourn until to-morrow morning at ten o'clock.

WEDNESDAY MORNING, May 20, 1891.

Court met pursuant to adjournment, and was opened by the crier.

Present, the Hon. Chas. Swayne, District Judge; J. N. Strippling, U. S. Attorney; E. C. Weeks, Marshal; Philip Walter, Clerk.

* * * * * * *

Ordered that this court do now adjourn until to-morrow at ten A. M.

THURSDAY MORNING, May 21, 1891.

Court met pursuant to adjournment.

Present, Hon. Chas. Swayne, District Judge; J. N. Strippling, U. S. Attorney; E. C. Weeks, Marshal; Philip Walter, Clerk.

Court was opened in due form by the crier.

* * * * * * *

Ordered that this court do now adjourn until to-morrow at two o'clock P. M.

FRIDAY, May 22, 1891.

Court met pursuant to adjournment.

Present, Hon. Chas. Swayne, District Judge; E. P. Axtell, Assistant U. S. Attorney; Roy P. Moody, Deputy Marshal; P. Walter, Clerk.

Court was opened in due form by the crier.

Ordered that this court do now adjourn until Monday Evening at six o'clock.

MONDAY MORNING, May 25, 1891.

Court met pursuant to adjournment.

Present, the Hon. Chas. Swayne, District Judge; E. C. Weeks, Marshal; Philip Walter, Clerk; J. N. Strippling, U. S. Attorney.

Court was opened in due form by the crier.

* * * * * * *

Ordered that this court do now adjourn until Saturday, May 30, at three o'clock P. M.

SATURDAY, May 30, 1891.

Court met pursuant to adjournment and was formerly opened by the crier.

Present, the Hon. Chas. Swayne, District Judge; J. N. Strippling, U. S. Attorney; Philip Walter, Clerk; Roy P. Moody, Deputy Marshal.

Ordered that until further order of the court that the Duval County Criminal Court room be the United States Court Building, the same being the building at the northwest corner of Market and Forsyth streets, in the city of Jacksonville.

CHAS. W. HORNE, vs. C. A. & R. T. SMITH. } In Ejectment. Judgment on Verdict.

A verdict for defendant having been rendered by the jury in this cause on the 24th day of January, 1891 and at the present term of this court,

It is now, therefore, ordered by the court that the defen-

dants, C. A. Smith and R. T. Smith, go hence without day and that they do have and recover of and from the plaintiff, Charles W. Horne, their costs herein expended, now taxed at $72.50-100.

* * * * * * *

Ordered that this court do now adjourn until Monday, June 8th, 1891, at twelve o'clock.

MONDAY MORNING, June 8, 1891.

Court met pursuant to adjournment and was duly opened by the crier.

Present, the Hon. Chas. Swayne, District Judge; Joseph N. Strippling, U. S. Attorney; E. C. Weeks, Marshal, Philip Walter, Clerk.

* * * * * * *

To E. C. Weeks, U. S. Marshal:

You are hereby instructed to adjourn the United States Circuit Courts at Jacksonville until the first Monday in August next, and said courts are hereby accordingly adjourned until that time.

CHAS. SWAYNE, Judge.

MONDAY, August 3, 1891.

Court met pursuant to adjournment.

Present, the Hon. Chas. Swayne, District Judge; Joseph N. Strippling, U. S. Attorney; E. C. Weeks, Marshal; Philip Walter, Clerk.

Court was opened in due form by the crier.

* * * * * * *

Ordered that this court do now adjourn until to-morrow morning at nine o'clock.

TUESDAY MORNING, August 4, 1891.

Court met pursuant to adjournment.

Present, the Hon. Chas. Swayne, E. S. Judge; Joseph N. Strippling, U. S. Attorney; E. C. Weeks, Marshal; Philip Walter, Clerk.

Court was opened in due form by the crier.

* * * * * * *

Ordered that this court do now adjourn until to-morrow morning at ten o'clock.

WEDNESDAY MORNING, August 5, 1891.

Court met pursuant to adjournment and was formally opened by the crier.

Present, E. P. Axtell, Assistant U. S. Attorney; R. P. Moody, Deputy Marshal; P. Walter, Clerk.

Ordered that this court adjourn to to-morrow morning at ten o'clock.

THURSDAY MORNING, August 6, 1891.

Court convened pursuant to adjournment and was opened by the crier.

Present, E. P. Axtell, Assistant U. S. Attorney; R. P. Deputy Marshal; P. Walter, Clerk.

The court was then adjourned until to-morrow at ten A. M.

FRIDAY MORNING, August 7, 1891.

Court convened pursuant to adjournment and was regularly opened by the crier.

Present, E. P. Axtell, Assistant U. S. Attorney; R. P. Moody, Deputy Marshal; P. Walter, Clerk.

Ordered that the court adjourn until to-morrow at ten A. M.

SATURDAY MORNING, August 8, 1891.

Court met pursuant to adjournment.

Present, E. P. Axtell, Assistant U. S. Attorney; E. C. Weeks, Marshal; P. Walter, Clerk.

Court was opened in due form by the crier..

There being no further business before the court, it was adjourned under the order made on the 4th of August; to Monday morning, October 5th next, at ten o'clock.

MONDAY MORNING, October 5, 1891.

Court met pursuant to adjournment at ten o'clock A. M.

Present, Hon. J. M. Stripling, U. S. Attorney; E. C. Weeks, Marshal; Jno. S. Driggs, Deputy Clerk.

Court was opened in due form by the Marshal.

MONDAY MORNING, October 31, 1891.

Court met pursuant to adjournment.

Present, the Hon. E. P. Axtell, Assistant District Attorney; C. E. Rogers, Deputy Marshal; P. Walter, Clerk.

Neither of the judges being present, the court was adjourned until Monday, November 2d, 1891, at twelve o'clock, noon.

I hereby certify that the foregoing pages, numbered 1 to 7, inclusive, are true and correct copies and transcripts from the record of the proceedings of the Circuit Court of the United States for the Northern District of Florida, at the December term, 1890.

In witness whereof, I have hereunto set my hand and the seal of said court, this 28th day of March, 1894.

(Signed) PHILIP WALTER, Clerk.

159-40

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court United States

OCTOBER TERM, 1894.

CHARLES W. HORNE,
PLAINTIFF IN ERROR,
vs.
C. A. SMITH AND R. T. SMITH,
DEFENDANTS IN ERROR,
} TERM NO. 341.

1. BRIEF FOR PLAINTIFF IN ERROR ON MERITS.
2. BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.
3. AFFIDAVITS ON MOTION TO DISMISS, AND PRINTED TRANSCRIPT OF SUPPLEMENTAL RECORD.

VANCE PRINTING CO., JACKSONVILLE.

IN THE SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1894.

CHARLES W. HORNE,
PLAINTIFF IN ERROR.
vs.
C. A. SMITH AND R. T. SMITH,
DEFENDANTS IN ERROR.
} Term No. 341.

STATEMENT OF THE FACTS OF THE CASE.

This is an action in ejectment, brought by Charles W. Horne, a citizen of the State of Ohio, plaintiff in the Court below and in error here, against C. A. Smith and R. T. Smith, citizens of the State of Florida, defendants in the Court below and in error here.

The declaration (pp. 2 and 3 of the Record) and the plea of the defendants that they are not in possession of the premises described in the declaration, are in the usual form prescribed by the statute of the State of Florida.

See Revised Statutes of State of Florida, Section 1513.

This action involved the right of possession and title to lot seven (7) of section twenty-three (23) and lots one (1) and two (2) in section twenty-six (26), township thirty-nine (39) south, range thirty-eight (38) east, except thirty-eight acres on the north side of said lot seven, which had been conveyed by the plaintiff's grantor. The lands described are located on the Indian River, which is a tide-water stream. The Court can take judicial notice of the fact that it is a tide-water stream as we understand the law.

The case was tried in the Court below on the plea of defendants that they were not in possession of the lands described in the declaration. The verdict of the jury is as follows:

"We, the jury, find for the defendants."

Whereupon judgment was rendered "that the defendants go hence, and that they do have and recover from the plaintiff, Charles W. Horne, their costs herein expended and now taxed at $."

Record, p. 4.

The plaintiff, to maintain the issue on his part, introduced in evidence a patent from the Government of the United States to one W. P. Tyler, and to his heirs and assigns forever, dated the 20th day of March, 1885, and a deed of conveyance from the said patentee to one George F. Ensey, and another deed from said George F. Ensey to the plaintiff in error. The plaintiff also introduced in evidence a certified copy of a plat of township 29 south, range 38 east, describing the lands in question and referred to in said patent. Plaintiff also introduced in evidence a letter from Stockslager, Commissioner of General Land Office, to W. D. Bloxham, United States Surveyor General of State of Florida, dated April 28th, 1889, which

said patent, deeds, plat and letter will be found in the Record and contained in the Bill of Exceptions on pp. 6 to 15, inclusive. The plaintiff also read in evidence the testimony of R. B. Birchfield, County Surveyor of Brevard County, in which the lands in controversy are located, which deposition, together with a plat made by the said Birchfield, and referred to in his testimony, will be found in the Record on pp. 15 to 22, inclusive.

There is also in the transcript of the Record pleas of the defendants numbered 2, 3, 4 and 5, together with a plat referred to in one or more of said pleas, which said pleas and plat will be found in the Record on pp. 22 to 24, inclusive. All of which pleas have been stricken from the Record on motion of the plaintiff, as will appear on p. 22.

The defendants, to sustain the issue on their part, examined C. A. Smith, one of the defendants; and his testimony, or the material portion thereof, will be found in the Bill of Exceptions in the Record on pages 24 and 25.

THE REAL QUESTION INVOLVED.

The real question involved in this case is whether, or not, the western boundary of the lands described in the declaration and the patent above mentioned, is, or is not, the waters of Indian River. It was, and is, contended by the plaintiff in error that the patent to these several lots, according to the official plat and survey of township 29 south, range 38 east, referred to in the patent and made a part thereof, included all the lands from the eastern boundary of the lots to the waters of the Indian River, and that this contention is sustained by numerous decisions of this Court. The defendants, on the other hand, had unlawfully entered upon and occu-

pied certain of the lands described, which they claimed was west of the lands conveyed by the patent and between such lands and the eastern boundary of the Indian River. The defendants, insisting that there was such a large area of land between a certain bayou which runs through the lands embraced in the patent and the waters of the Indian River, that the usual rule of law upon this subject did not apply, and the Court below sustained their contention in its instruction to the jury.

ASSIGNMENTS OF ERROR.

The assignments of error are five in number, and are as follows:

I. That the court erred in admitting any testimony to prove that the official plat of the survey of the lands in controversy was incorrect, it being the official plat according to which the lands in controversy were sold and patented by the United States to U. P. Taylor; and it still being the plat recognized as official by the General Land Office, and according to which all sales of land in that township had been made.

II. That the Court erred in admitting the testimony of the defendant, C. A. Smith, which was, in substance, that there was, and is, a large tract of good land lying between the lands of the plaintiff and the waters of the Indian River, which land is unsurveyed Government land; that said tract of land lay adjoining the land of the plaintiff and to the west of it, and that plaintiff's land and this unsurveyed land were separated by a savannah or bayou.

Plaintiff in error contends, that as the official plat of the survey of the township in which the land in controversy lies shows that plaintiff's lots are bounded on the west by the Indian River, and that there is no unsurveyed land between plaintiff's west boundary and

said river, and that plat being in evidence in the case and referred to in the patent, that the court erred in admitting the testimony of the said defendant to contradict the facts as set forth on the plat.

III. That the Court erred in refusing plaintiff's request that the following charge be given to the jury:

"The certified copy of the official map or plat of the lands made and adopted by the Government of the United States, and in evidence in this case, is as much a part of the patent, also in evidence, as if it had been copied into and made a part of the patent itself. This plat shows that the western boundary of the lots in question in this action in the waters of the Indian River, in accordance with the Acts of Congress which require the lines of lots or fractions of a section on navigable rivers, where surveyed to run to the waters of the river.

"Purchasers of the land from the United States buy, and the Government sells, public lands according to the official maps or plats made by its own officers and kept in its land offices for inspection, to show, among other purposes, to purchasers the location of any given piece of land and its boundaries.

"The Court instructs you that the plat in evidence in this case, made by officers whose duties require them to make correct surveys and correct plats of all lands of the Government, is presumed to be correct; and it is your duty to be governed by it in making up your verdict."

IV. That the court erred in refusing to instruct the jury, as requested by the plaintiff in error, as follows:

"It is not within your power to disregard the survey of these lots as made by the Government and shown

by the plat in evidence. If the survey is not correct, the executive department of the Government may perhaps correct it by a new survey; and if the patent in evidence conveyed more land to the patentee than the Government has received pay for, that department can pursue such remedy as the law gives; but this Court and jury have no power or authority to deprive the plaintiff of any lands within the boundaries of the lots in question, as shown by the official plat in evidence, even though a less quantity of land has been paid for than is included in such boundaries."

V. That the Court erred in instructing the jury as follows:

"That it is the rule that the meander line is not the boundary line—they are run not as boundaries of the tract, but for the purpose of finding the sinuosities of the stream.

"Fractional divisions, made so by the water, are designated and sold by the numbers attached to, and reference is always had to the notes and maps of the survey. The water in the notes is the boundary, and when there exists a difference between the meander line as run and the actual margin of the stream or lake the water is the true boundary; but this rule has its limitations, as, for instance, a case in Polk County with which I am familiar, where there is fifteen miles intervening between the meander line and the margin of a lake. This breaks the rule, and I charge you that when, as in this case, there is from three-fourth of a mile to a mile and a quarter between the meander line and the actual margin of the river, and when for half a mile in width this land has oak trees on it from three to four feet in diameter, especially where the waters make up, forming a bayou which

conforms substantially to the meander line of the Government survey, this is not within the rule."

Wherefore, the said plaintiff in error prays that the judgment of the said Circuit Court of the United States for the Northern District of Florida be reversed, and that the said Court be ordered to grant a new trial of said cause.

POINTS OF LAW.

First—It is apparent that these five assignments of error raise three contentions.

(a) That under the laws of the United States, in the surveys of fractional sections bounded by a navigable river, or stream, the east and west lines in this case run to the waters of the Indian River, and those waters, and not the meander line, are the western boundary of the lands in controvery.

(b) That is such case no evidence is admissible to contradict, change or modify such survey and boundaries thus established.

(c) That where the Government has sold and conveyed by patent fractional sections bounded by a navigable river or stream, according to the plat of the survey referred to in the patent, that plat becomes a part of the patent, and that such survey and boundaries, as established by the Executive Department of the Government, absolutely conclude the Judiciary Department of the Government upon these questions. These contentions on the part of the plaintiff in error have been sustained by this Court in the following cases:

Lindsey vs. Howes, 2nd Black, 554.

7th Wall., 272.

8th Wall., 337.

3rd How., 650.

Craigen vs. Powell, 128 U. S., 691.

Hardin vs. Jordan, 140 U. S., 371.

Mitchell vs. Smale, 140 U. S., 406.

In this connection it will be observed by the letter of the Commissioner of the General Land Office, hereinbefore referred to, p. 14 of the Record, that all the lands in township 29 south, range 38 east, had been disposed of by the Government prior to April 20th, 1889, and that the plat of said township, or that portion thereof south of range 38 east, lying between the Indian River and the Atlantic Ocean, *was an official plat, and that all the lands therein had been disposed of according thereto.*

We submit, therefore, that the Court erred in permitting C. A. Smith to testify as he did testify (Record, pp. 24 and 25) that the United States survey and the official plat aforesaid was not correct, and that there were unsurveyed lands lying between the lots claimed by the plaintiff and the Indian River. Such testimony tends directly to contradict the patent, the aforesaid plat and the decision of the Commissioner of the General Land Office contained in the letter above mentioned.

Clagin vs. Powell, 128 U. S., 691–697.

Second Point—The Court below admitted that the general rule was that the meander line is not the boundary line, and that the waters of the river, or stream, in which the land is located, is the true boundary according to the United States surveys, plats and patents, as will be seen by the instructions to the jury, p. 26 of the Record; but the said Court said *there were limitations to the rule*, and assumed from the testimony of Smith, which

has been shown as not admissible in evidence at all, that there were from three-fourths of a mile to a mile and a quarter between the meander line and the actual margin of the river, and that such land had oak trees on it from three to four feet in diameter, and held that in such case the Government surveys, plats and decisions of this Court did not apply and that the defendants could show that there were unsurveyed lands within the boundaries in question which did not pass by the patent, although the Executive Department of the Government had decided that there were no such unsurveyed lands, and that all the lands in the township had been sold and disposed of. This was clearly erroneous according to the decisons of this Court cited.

128 U. S., 698–699.

Third Point—According to the copy of the official plat in the Record, between pp. 12 and 13, that plat was approved as early as December, 1856. When the actual survey was made by the United States we do not know, and it is fair to infer that in the course of thirty or forty years the boundary of the Indian River might undergo changes, and that by the violent action of storms and floods the area of land embraced in the patent would be increased.

Smith, one of the defendants, testified (on p. 25 of the Record) as follows: That "the land lying between the savannah and the river, which we occupied, *is in some places from four to six feet above the level of the river, and that for a mile the land on the east and west lines is covered with a growth of livecoak trees, many of them three and four feet in diameter.*"

We have already shown that this testimony was inadmissible, and therefore cannot be given any force or

effect in this controversy; but, if admissible, its credibility would be effected from the fact that the witness is one of the defendants. He does not say *how many live oak trees there are three and four feet in diameter*, nor how often they are found, nor what the length of the trunk of such trees is. It is within the common knowledge of all that scrub oaks are found on the sand hills or elevated places in the margins of low lands on the east coast of Florida which are of a large diameter at the ground but have no trunk at all of any value, and that such trunk from two to five feet from the ground is split up into several smaller ones, and which by their stinted and scrubby growth are of no value at all, and they are not an indication that the lands are of any value. During the long period which has elapsed since the surveys of these lands were made it is not improbable that a few trees of this character are found on the premises and that they may have been carried there since the survey from other places by the force of winds and storms, but whether such trees are large or small they cannot change the law of the case. The Government of the United States is amply able to take care of itself. It has been decided through the Executive branch of the Government having such matters under control, that the survey of the premises was correct, that the plat was correct, and all the lands therein referred to have been sold before this suit was brought (140 U. S., pp. 413–414). If the area of the lands sold by the Government to the patentee was not correctly estimated and paid for, the Government may correct this by proper proceedings of its own. If there are any lands in the locality where the defendants claim there are which have been unsurveyed, the Government may have them surveyed, perhaps, and disposed of accordingly, but it appears from this Record that it has been decided by the Executive Department that

there are no unsurveyed lands in the township in question, *and this Court has repeatedly condemned an effort* on the part of the General Land Office to have a second survey made after the lands have been disposed of according to the first survey and thereby raise doubts as to the title of the patents in the first survey and produce contentions and conflicts over titles and boundaries.

128 U. S., 699.

17 How. 30.

140 U. S., 412–413.

(a) It is submitted that the Court erred in allowing Defendant Smith to give testimony impeaching the truth and accuracy of the Government surveys; that such testimony was inadmissible for any purpose.

(b.) *The Court below, in the eye of the law, could not judicially know whether or not there was any land occupied by defendants not covered by the patent from the Government, because the Executive Department had decided that all the lands to the waters of the Indian River are conveyed by patent.*

(c) Also, Court erred in charging the jury *that the decision of the Executive Department was not conclusive on the court.*

(d.) It necessarily follows that the defendant's plea that they were not in possession of the lands described in the declaration was untrue, and that Smith's testimony in support of such a plea was illegal, and prohibited by the decisions of this Court.

EFFECT OF JUDGMENT.

Verdict was a general finding for defendants. Plea is that defendants "*are not in possession of lot 7, section*

23, and lots 1 and 2, section 26, township 29 south, and range 38 east, on Indian River, according to the official plat of the survey of said lands." Record, page 3.

This judgment would be a bar to plaintiff's claim to any portion of the lands described in his declaration. The finding of the jury is, in legal effect, that defendants *were not in possession of any part of the land described in the pleadings*, and judgment is in usual form. If defendants should, under this verdict and judgment, claim all the lands between eastern boundary and meander line, plaintiff could not oust them by ejectment, for the above verdict and judgment would be conclusive that defendants are not in possession; and in ejectment *proof of possession by defendant is essential to recovery.*

Fictitious proceedings having been abolished in ejectment, one judgment is conclusive.

The record of this case would bar plaintiff in another suit from proving that defendants, or those claiming under them, are in possession of any parts of the lots in controversy, even conceding that the western boundary was not the east shore of the Indian River, but the meander line was.

It is therefore submitted that the judgment should be reversed; for the errors of the Court, in admitting testimony of Smith that the lands defendants are on *are unsurveyed lands and not included in the patent* to Tyler, and in instructing the jury *upon Smith's evidence* that the rule that the patent conveyed all the land within the boundaries of the plat, *did not apply to this case.*

H. BISBEE,
For Plaintiff in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ON MOTION OF DEFENDANTS IN ERROR TO DISMISS THE WRIT OF ERROR.

Points and Authorities.

First—The first ground stated for the dismissal of the writ of error is that it was issued before the judgment was rendered. According to the printed transcript of the Record this would be true. According to such transcript the judgment was entered on the 30th day of June, 1891, and the writ of error was issued on the 8th day of the same month and year. The date of the judgment in the printed transcript is not correct. The actual date of the judgment is the 30th day of May, 1891, nine days before the writ of error was issued. This will appear in a transcript of the judgment in an appendix attached to this brief. The error in the date of the judgment is that of the clerk who made up the Record, which seems to have escaped the attention of counsel. We ask that the original of the supplemental transcript be filed and considered as a part of the transcript in this action.

Second—The second ground for dismissal of the writ is that the bill of exceptions was not settled or filed during the term. In answer to this objection we say the fact is, the bill of exceptions was made and settled a short time after the verdict and during the month of January, and left with the trial judge at his chambers for his signature.

That the said judge was absent the greater portion of the months of February and March, holding court at Tallahassee and Pensacola, Florida. Whether or not the bill of exceptions was actually signed before the 18th day of May, counsel cannot state. On the night of the 18th of May, 1891, the Federal Court rooms in Jacksonville and all the records and files of the Court in all cases then pending, or which had ever been pending in the Circuit Court of the United at Jacksonville, were entirely destroyed by fire, except portions of the files in one or two cases, which his Honor, Judge Pardee, had under advisement in New Orleans. The Record was re-established in accordance with the law. Another bill of exceptions was prepared and submitted to counsel on the other side; the bill of exceptions was amended in accordance with the suggestion of counsel for defendants, and left with the trial judge for signature. The trial judge was absent from the State a greater portion of the time from the middle of June until October, but the Court was regularly adjourned from time to time, from the first Monday in December, 1890, the date fixed by law for holding it, until the 31st day of October, 1891. This will appear by the supplemental transcript of the Record in the appendix. The bill of exceptions shows on its face that the exceptions were duly taken at the trial, and the fact that they were not signed until the 30th day of October, 1891, is not the fault of the plaintiff or his counsel.

Plaintiff cannot be prejudiced by the failure of the Judge to sign the bill.

Davis vs. Patrick, 122 U. S., p. 139.

The affidavit of H. Bisbee and letter of defendants' counsel attached shows that the delay was consented to by them.

Thus the second ground to dismiss the writ is removed, provided the Court below has power to adjourn beyond the time for holding the Term at Tallahassee, which begins on the first Monday in February, and at Pensacola, which begins on the first Monday in March. Attorney for plaintiff here states that it has been the custom of the Circuit Court for the Northern District of Florida for twenty-five years to adjourn the Court from time to time, and thus keep it open during the greater portion of the year. In the meantime Court is held at Tallahassee and at Pensacola. It is the same Court and has jurisdiction over the same territory, whether sitting at Jacksonville, Tallahassee or Pensacola. The point made by the defendants' attorney is that the Court has no power to adjourn beyond the time for its regular term at Tallahassee or Pensacola. If this position is sustained, then the logic of defendants' position is that the Court was not legally in session on the 30th day of May when the judgment was rendered. Consequently there is no final judgment in the case.

Defendants did not raise this question in the Court below, and presumably judgment was rendered on defendant's motion.

If the contention of the defendants is sustained that all the proceedings of the Court had after the time for holding Court in Tallahassee are void, very serious consequences follow. Many persons who have been convicted of crime must be set free, and many civil cases that have been tried and judgments and decrees rendered are still pending and will have to be tried again.

If a State law provide for the Court to be held in different places in the same county, such a case would be analagous. Here the Circuit Court of the United

States is organized for certain territory—the Northern District of Florida. The statute fixes the time and place for three terms of Court. But inasmuch as the jurisdiction of the Court extends throughout the whole Northern District of Florida, no matter where the Court is held, and no matter in what portion of the District the defendant resides, he may be sued at any place where the Court is held, and we can discover no reason why the Court at Jacksonville cannot be adjourned from time to time and be legally in session up to the day before that fixed for the next term at Jacksonville, at least for the purpose of signing a bill of exceptions.

Third—The third ground for dismissal of the writ of error is that the bill of exceptions was signed subsequent to the issuing of the writ and citation. This point has been expressly overruled more than once by this Court. This precise point was made, considered and overruled in the case of Hunnicut vs. Payton, 102 U. S. Rep., 333. The objection is no ground to dismiss the writ. The only question is whether or not the bill of exceptions can be considered at the trial on the merits.

Fourth—The fourth ground for dismissal of the writ is that it was not under seal. This defect is amendable under Section 1005 of the Revised Statutes. This writ of error was issued a short time after the destruction of the seal of the Court by fire, and at the time it was issued the clerk had no seal.

See affidavit of clerk in appendix.

Fifth—The fifth and last ground for dismissal of the writ of error is that the value of the property in dispute does not exceed $5,000. The plat in the Record (pp. 12 and 13) from the General Land Office shows that the property involved in the suit was lot 7, section 23,

and lots 1 and 2, section 26, township 29 south of range 38. The plaintiff, by his declaration and by the evidence, claimed all the lands embraced in lots 7, 1 and 2, from the eastern boundary line of the said sections to the Indian River. Under Section 1513 of the Revised Statutes of the State of Florida, a defendant in ejectment may deny possession by special plea. Such special plea was interposed in this case by the defendants. *The declaration averred that the defendants were in possession of a certain tract of land describing it according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General.*

Record, p. 13.

The defendants' plea avers substantially that they are not in possession of any of the land described in the declaration.

Record, p. 3.

Thus the possession of the entire tract of land embraced in the three lots according to the official survey was put in issue. This was the only issue tried by the jury. Certain other pleas, numbered 2, 3, 4 and 5, were interposed by defendants but stricken out on motion of plaintiff; but were put in evidence by the plaintiff by reason of certain admissions therein contained, and are found in the Record on pages 22 to 24, inclusive.

The judgment was for defendants, and the necessary result is a judgment that the defendants are not in possession of *any* of the land described in the declaration. It is true that at the trial the defendants sought by evidence to show that the plaintiff's western boundary line was the meander line of the United States surveyor, and not Indian River, and that there were several hundred acres of land between such meander line and the waters of the Indian River which did not pass by the patent.

The defendant's third plea, page 23 of the Record, alleges that there is about six hundred acres to the west of the line which belongs to the plaintiff which appears as water upon the plat under which plaintiff claims. While it is true that at the trial the defendants did not claim to be in possession of any of the lands claimed by the plaintiff, except that between the meander line and the waters of the Indian River, yet the plea put in issue the possession of all the land claimed by the plaintiff, as well that east of the meander line as that west of it, and, as stated, the verdict was for the defendant on that issue; and the consequences of the judgment are that the plaintiff is not in possession of any of the land, and that the plaintiff has no title to any of it.

It is this judgment plaintiff seeks to have reversed. The question then arises what property was in controversy. We do not see how the conclusion can be avoided that all the property affected by the judgment is in dispute in this Court, for if this judgment stands it is necessarily an adjudication that at the time suit was brought the defendants were not in possession of any of the tract of land embraced within the boundary lines of the three lots in question. The western boundary line of this land was the waters of the Indian River. This has been repeatedly decided by this Court. That is to say, the meander line is not run as a boundary line at all, and that notwithstanding the meander line, the boundary is the waters of the river in this case. Also, that the plat referred to in the patent becomes a part thereof, and is as effectual to fix the boundary as if incorporated into the patent.

The official survey is obligatory on the Court, and its correctness cannot be questioned by the Court. 128th U. S., 691.

This Court's judgment on these questions was overruled by the Court below.

Record, p. 26.

DEFENDANTS' POSSESSION.

It will be observed that the defendants admit that they are in possession of the land between the meander line and the river. See their pleas numbered 2, page 22, and 4 and 5, page 24.

Also, the affidavit of one of the defendants, page 13, of brief of defendants in error on motion to dismiss.

The ground upon which defendants claimed they were not in possession was because the part that they were actually in possession of, to-wit: The land between the meander line and the river, was not the property of plaintiff. And the Court below, in its instructions to the jury, sustained the defendants' contention, and said that the rule declared by the Supreme Court of the United States—that the boundary line extended to the river, and that the patent carried the title to all the land included in the plat referred to therein—did not apply to this case because of the large area of land between the meander line and the river.

See instructions to the jury. Record, p. 26.

Interior Department decided in 1889 that the lands occupied by defendants were not unsurveyed, and had all been disposed of.

Record, p. 14.

VALUE OF LAND IN CONTROVERSY.

The Plat in the Record shows that in the three lots, according to the government survey limiting the area to be paid for to the meander line, contained 170.49 acres.

That is, 73.6 acres in lot 7; 54.91 acres in lot 1; 42.53 acres in lot 2; of which thirty acres from the northern end of lot 7 had been sold before the conveyance to plaintiff.

See deed to plaintiff. Record, p. 7.

Now, if all the land claimed by the plaintiff (that is, including that east as well as that west of the meander line), is in dispute, as we contend it is under the pleadings, then it is very clear that its value exceeds $5,000. The deed to the plaintiff shows that he paid $2,500. The price paid is properly to be considered.

May vs. Sloan, 101 U. S., 231.

This deed was made to him on the theory that his grantor only owned 140 acres. That is, there were but 170 acres between his eastern boundary and the meander line, of which 30 acres had been sold. Now, defendants admit in their third plea, Record, page 23, that there is about 600 acres between the meander line and the river. The affidavit of Birchfiel, County Surveyor, page 8 of defendants' brief, says that there are about 360 acres of land between the meander line and the margin of the river; and of this about 100 acres is good land, worth $30 per acre. The other affidavits in defendant's brief admit this 100 acres of good land west of the meander line is of the value of $3,000. Assuming that the 100 acres of high and dry land east of the meander line is of the same value per acre as that west of the meander line, to-wit: $30 per acre, the value of the high and dry land embraced within the controvery would exceed $7,000 independent of any claim for damages or mesne profits. Even if the 140 acres east of the meander line is excluded and considered not in dispute under the pleadings, the amount in dispute would still exceed the jurisdictional

amount. It is conceded that the 100 acres of high land west of the meander line is worth $3,000, and the remainder of it is worth $1 per acre, of which there are 500 acres, according to the defendants' pleas, which were sworn to. Defendants' fifth plea, page 24, alleges that the improvements they have made on the land are worth the sum of $2,000. Thus, upon defendants' own admissions, the value of the land west of the meander line would be $5,500.

OTHER EVIDENCE OF THE VALUE OF LAND IN CONTROVERSY.

Special attention of the Court is called to the affidavit of the plaintiff in error in the appendix to this brief, on p. ——, and to the affidavits of John Hetherington and R. D. Hoke in appendix to this brief on pp. —— and ——. The affidavit of the plaintiff in error shows that the property described in the declaration cost him more than $5,000, at the time the writ of error was sued out. The affidavits of the plaintiff and of Hetherington and Hoke establish that the lands in controversy claimed by the defendants, to wit., the lands between the meander line and the waters of the Indian River are very valuable for the cultivation of the cocoanut, pineapple, lemon and orange; that the cocoanut tree is best cultivated in a locality where the roots of the tree penetrate soil saturated by the salt water, and that such is the locality of the lands in question. It will also be observed by the plat made a part of the patent herein referred to that the lands in question are located on a narrow strip of land between the Indian River and the Atlantic Ocean, and that consequently such lands are specially valuable for the cultivation of semi-tropical fruits, for the reason that in times of low temperature reaching the freezing point

the wind or currents of air are usually from the northwest, and that such currents of air are tempered by passing over the waters of the Indian River before reaching the groves of tropical plants on the lands of the plaintiff. It is a matter of common knowledge that the location of groves of tropical fruits on the east or south side of any considerable body of water is deemed to be by fruit growers especially favorable, for the reason that by such location their groves escape uninjured; whereas groves located on the west or north side of bodies of water would be seriously injured by frosts.

SUPREME COURT UNITED STATES.

CHARLES W. HORNE,
PLAINTIFF IN ERROR.

vs.

C. A SMITH & R. T. SMITH,
DEFENDANTS IN ERROR.

Personally appeared before me, Frederic C. Penfield, the United States Agent and Consul-General in Egypt, Charles W. Horne, who being duly sworn before me, deposes and says:

That the property described in the declaration in the above-entitled action had, at the time the writ of error therein was sued out, cost this deponent considerable exceeding the sum of $5,000.00. And this deponent verily believes, and it is his opinion, that the said prop-

erty, at the time aforesaid, actually exceeded in value the sum of $5,000.00. And this deponent further says, that the cocoanut is successfully grown in the latitude where the said property is located, and that the cultivation of the cocoanut has become a valuable and profitable industry; and this deponent says that he has been on the property in question, and caused to be made improvements thereon, and that he is informed and believes, and on information and belief states, that the lands described in said declaration, both east and west of the meander line, are suitable to the cultivation of the cocoanut, as well as other semi-tropical fruit, such as the pineapple, the lemon, the orange, and the whole of the citrus family. And this deponent says that, if he is correctly informed in this respect, the said lands west of the said meander line would far exceed in value the sum of $5,000.00, and that in his opinion and judgment, from knowledge this deponent possesses and information he has received, the one hundred acres, which the defendants by their affidavits admit to be worth $30.00 per acre, is worth $50.00 per acre. And this deponent further says that, if his knowledge and information is correct, the cocoanut tree flourishes best on low lands, where the roots penetrate the soil saturated with salt water. And, if this be true, and this deponent is informed and believes it is true, then a large portion of the remaining lands west of the meander line would be very valuable for and adapted to the cultivation of the cocoanut. And this deponent further says that the time he herein refers to is at or about the time the writ of error in this action was sued out. Deponent further says that he cannot return to the United States without great inconvenience and without the risk of financial losses. And this deponent further says that he is taken by sur-

prise by the defendants in error claiming that the matter in dispute in this case does not exceed the sum of $5,000.00, for the reason that he was informed by his attorney of record that the record itself, including the admission of defendants that they had made improvements to the value of $2,000.00 on the lands they claimed to be in possession of, showed that the matter in dispute did exceed the sum of $5,000.00. Deponent further says that he has no acquaintances or friends among the inhabitants residing in the vicinity of the lands in question, that he has never personally occupied the lands, but is a citizen of the State of Ohio. That said inhabitants are in full sympathy with the defendants in this action, and he verily believes that it would be useless for him to apply to any of the said inhabitants for *ex parte* affidavits in respect to the value of the said lands or any of them.

And further this deponent saith not.

C. W. HORNE.

AGENCY AND CONSULATE GENERAL OF THE UNITED STATES AT CAIRO.

On the 31st day of December, 1894, before me, the undersigned, United States Agent and Consul General at Cario, Egypt, personally appeared Charles W. Horne, who made oath to the foregoing deposition.

Given under my hand and seal of this Agency and Consulate General, the day and [SEAL] year above written.

FREDERIC C. PENFIELD,

U. S. Agent and Consul General.

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF FLORIDA,
BREVARD COUNTY.

On this day personally came before me John Hetherington of Fort Pierce, Florida, well known to me as being entirely worthy of credit, and who, being first duly sworn by me deposes and says:

That he is familiar with the cultivation and growth of the cocoanut on Indian River; and that the cocoanut flourishes on low lands where the roots will penetrate below the salt water level.

And affiant believes that the cultivation of the cocoanut on the lower Indian River is, or will become by increasing the area now planted, a valuable and lucrative industry.

And further affiant says that he believes, by reason of the location and fertility of the Horne place on Indian River, that great part of it is well adapted to the growth of the cocoanut.

Sworn to and subscribed before me, this first day of December, A. D. 1894.

JOHN HETHERINGTON.

MARVIN S. JONES,
County Judge.

[SEAL.]

STATE OF FLORIDA,
BREVARD COUNTY,

On this day personally came before me R. D. Hoke of Jenson, Florida, in said county, well known to me as

being entirely worthy of credit, and who, being first duly sworn by me, deposes and says:

That he is familiar with the cultivation and growth of the cocoanut on the Indian River, and that the cocoanut flourishes on low lands where the roots will penetrate below the salt water level.

And affiant believes that the cultivation of the cocoanut on the lower Indian River is, or will become by increasing the area now planted, a valuable and lucrative industry.

And further affiant says that he believes, by reason of the location and fertility of the Horne place on Indian River, that great part of it is well adapted to the growth of the cocoanut.

Sworn to and subscribed before me, this first day of December, A. D. 1894.

R. D. HOKE.

MARVIN S. JONES,
County Judge.

[SEAL.]

RECORD SHOWS JURISDICTIONAL AMOUNT WITHOUT EVIDENCE ALIUNDE.

The declaration, p. 3 of the Record, claims profits and damages to the amount of $1,200 annually, and alleges that the defendants were in possession since the 1st day of January, 1887. The verdict was rendered January 14, 1891. It was, therefore, possible and within the bounds probability that the plaintiff could have recovered damages to the amount of at least $4,800. This, with the $2,060 admitted by defendants to be the value of the improvements on the lands, exceeds the jurisdictional

amount, omitting the value of the land itself. Where the Record shows the jurisdictional amount, and there was no controversy about it in the Court below, affidavits will not be admitted to contradict or vary the value of the property as stated in the Record.

Richmond vs. City of Milwaukee, 21 How., 391.

Under the Statutes of Florida, the plaintiff in ejectment can recover the premises and also rental value, waste and other damages sustained.

The common law action of trespass for damage and a separate action for mesne profits is not necessary, as it was at common law after judgment in ejectment.

Ashmead vs. Wilson, 22 Fla. Rep., 256, 262.

It is obvious that the amount of the money judgment which the plaintiff could recover does not depend upon the rental value of the land. He can recover for any waste committed, such as the destruction of timber; and the defendants admit in their pleas that they have made improvements upon the land and cleared portions of it for cultivation, and necessarily they have destroyed the timber theron. Defendants' contention is, the plaintiff offered no evidence touching the matter of profits or damages. Under the issue tried such evidence was inadmissible. The defendants did not by their pleas deny their liability to damages, nor did they deny that the profits were annually worth $1,200 as alleged in the declaration. *A plea of not guilty would have put this question in issue, but the plea of not in possession did not.* These facts stated in the declaration not being put in issue are admitted by the defendants, and the result is that the Court cannot say that the amount claimed for profits and damages is not made in good faith, for so far as the Record discloses the plaintiff might have recovered

them. If he had recovered a verdict he might have recovered all the damages he had sustained. The defendant is not in a position to contend that the amount demanded was not made in good faith, when, by his pleading, he has admitted the amount of the damages as claimed by plaintiff. *And we understand the decision of this Court to be that where it appears from the whole Record, under any aspect of the case, that the plaintiff could recover the full amount of his claim, the Court will not decline jurisdiction. It is the amount of the plaintiff's claim that is the test of jurisdiction, where judgment goes for the defendant.*

141 U. S., 206.

SECTION 691 OF THE REVISED STATUTES REPEALED.

We further contend that the statute limiting the jurisdiction of this Court to cases involving over $5,000.00 has been repealed by the Act of March 3d, 1891. This Court has so decided in the case of National Exchange Bank vs. Peters, 144 U. S., p. 570.

In re Clarkson, 140 U. S., 200.

The repeal took effect upon the approval of the Act of March 3d, 1891. It necessarily follows, we think, that since the approval of the Act of March 3d, 1891, the only limitation as to the amount involved is in that Act itself. The concurrent resolution of March 3d says that nothing in said Act shall be held or construed in any way to impair the jurisdiction of the Supreme Court in respect to any case, wherein the writ of error or appeal shall have been sued out or taken to said Court before the first day of July, 1891. One of the objects of this concurrent resolution was to give the litigant the right to bring his case to this Court until the United States Circuit Courts of Appeals should be organized, and it was assumed that they would be organized by the first

of July. Between the date of approval of the Act of 1891, which repealed the $5,000.00 limitation to July 1st of that year, any suit could be taken to this Court by appeal or writ of error from the Circuit Court, of which the latter Court had jurisdiction. That is to say, Section 691 of the Revised Statutes being out of the way, there was no limitation as to the amount involved. This construction does not *impair* the jurisdiction of this Court, but sustains it. We can discover no reason for the contrary contention. The obvious intention of Congress was to declare that there should be no limitation as to amount except as found in the said Act of March 3d, and that the former limitation of $5,000.00 should cease to exist on the approval of the Act and not on the first day of July.

H. Bisbee
for Plaintiff in Error

APPENDIX.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1893.

CHARLES W. HORNE,
Plaintiff in Error
vs.
C. A. and R. T. SMITH,
Defendants in Error.
No. 672.

Personally appeared before me, Philip Walter, Clerk of the United States Circuit Court for the Northern District of Florida, H. Bisbee, who, being duly sworn, deposes and says:

That the plaintiff in this action is beyond the seas; that when last heard from he was in Asia. This deponent does not know when plaintiff will return, but he

believes that he will return before the next term of this Court. This deponent says that he has no correspondent residing near the land in controversy in this State to whom he can apply for evidence as to its value, and has no personal knowledge of its value; that, at the time this writ of error was issued in this case, this deponent had an interview with the plaiatiff and was assured by plaintiff that the value of the property in dispute exceeded $5,000.00, and that he could establish, by competent evidence, his claim that the property exceeded in value the sum of $5,000.00. Deponent says that he does not know that the land is very favorably located. It is between the Indian River and the Atlantic Ocean, forming a part of a narrow strip of land that is very favorably located for many purposes. It is favorable for tropical and semi-tropical fruits, because the atmosphere is tempered by the waters of the Atlantic Ocean and Indian River, and thus largely protected from frosts. The value of the land is not limited to the mere purpose of cultivating vegetables, which the defendants have been engaged in, but it is especially valuable for tropical fruits, and especially cocoanut trees, which are more successfully grown where their roots will reach salt water than anywhere else, according to the knowledge and information of this deponent. Deponent verily believes that the presence of the plaintiff is necessary to enable him to obtain evidence to establish that the value of the land in dispute exceeds the sum of $5,000.00. The plaintiff has been on the land and is familiar with its value and ought to know to whom to apply for such evidence, and this deponent does not know.

This deponent further says with reference to the Bill of Exceptions in this case, that he, himself, prepared the Bill of Exceptions within a very few days after the ver-

dict was rendered, which was on the 14th day of January, 1891, and that a copy thereof was submitted to the defendants' attorneys of record, who suggested amendments thereto, which amendments were made, and the Bill of Exceptions was left with the trial Judge at his chambers in Jacksonville for signature. Whether or not the said Judge signed the Bill of Exceptions before the 18th of May, 1891, deponent does not know. On the night of the 18th of May, 1891, the Federel Court House at Jacksonville and all the records thereof and the seals of the courts, district and circuit, and all the pleadings and files of every case then pending, or which before that time had been tried and determined, were entirely destroyed by fire, except parts of the Record in two or three cases, which his Honor, Judge Pardee, had under advisement at New Orleans. Soon after the said fire this deponent prepared another Bill of Exceptions, and copies of the pleadings and the Record were re-established in accordance with law. This second Bill of Exceptions was also submitted to the counsel of record for defendants, and was satisfactory to them, and they consented thereto. By letter, under date of August 6th, 1891, from Messrs. Robbins & Graham, defendants attorneys, to Messrs. Bisbee & Rinehart, of which latter firm, deponent is the senior member, which is attached to this affidavit, it will be observed that the defendants requested the Record in this case to be sent to them, and that they would examine it and consent to its re-establishment. The Record and the Bill of Exceptions was sent to them accordingly and was returned without objection. Soon after the date of this letter of August 6th, the Federal Court at Jacksonville adjourned until the early part of October, as will be seen by the supplemental transcript, made a part of plaintiff's brief in this case. No formal order was entered in this

case extending the time to prepare the Bill of Exceptions, for the reason that it was understood by the counsel on both sides that the Court would not finally adjourn until some time in the fall of 1891, and that the Judge could sign the Bill of Exceptions whenever it was covenient for him. And the supplemental Record referred to shows that the Bill of Exceptions was signed before the final adjournment of the term.

This deponent further says that the trial Judge, to-wit: Hon. Charles Swayne was absent from the State of Florida from about June 10th to the early part of August, and from the early part of August to the early part of October, 1891; that the time for filing the transcript of the Record of this Court was duly extended according to law, as will appear by orders of the trial Judge on file in this Court in this cause.

Deponent further says that the Circuit Court of the United States for the Northern District of Florida was duly opened and held on the first Monday in December, 1890, and was continued in session by adjournment from time to time to the 30th day of May, when the judgment in this case was rendered, and was continued in session by adjournment from time to time from the 30th day of May until the 31st day of October, 1891. Deponent says that it has been the uniform custom for twenty-five years for said Court at Jacksonville to adjourn the latter part of February to some day beyond the time when the regular term of the said Court commences at Tallahassee and Pensacola, and after the business at Tallahassee and Pensacola is transacted the Court resumes the transaction of business at Jacksonville. Deponent says that the defendants never at any time suggested that the Court was not legally in session; and, in fact,

had their judgment entered up in this case on the 30th day of May of said year.

Deponent further says, in respect to the alleged absence of the seal to the writ of error, that the seals of the Court were destroyed by fire; that the Clerk of said Court found the die of the seal of the Circuit Court, and for some time issued writs by placing the paper on the die and rubbing it with some hard substance, and succeeded in making a faint impression of the seal on the paper. Whether or not the Clerk attempted to attach the seal in this manner to the writ of error in this case deponent does not know; but attaches hereto the affidavit of the Clerk himself on that subject.

Subscribed and sworn before me, this 28th day of March, A. D. 1894.

P. WALTER, Clerk. H. BISBEE.

[Copy.]

TITUSVILLE, FLA., August 6, 1891.

MESSRS. BISBEE & RINEHART,
Jacksonville, Fla.

Gentlemen:

I have been away and could not answer your letters sooner. I thought it was all understood about the Record in the case of Horne vs. Smith. I wrote on your draft of the record my recollection of Smith's testimony and also of the Judge's charge. If you will look through your own papers you will find this mem. I expect you to incorporate these in your Bill of Exceptions, and when completed, to send the Record to us, and we will O. K. it and consent to its re-establishment. I see no necessity for going to Jacksonville.

Yours truly,

ROBBINS & GRAHAM.

Dic. by R.

SUPREME COURT UNITED STATES, OCTOBER TERM, 1893.

CHARLES W. HORNE,
Plaintiff in Error.
vs.
C. A. & R. T. SMITH,
Deefendants in Error.
} No. 672.

Personally appeared before me, Philip Walter, Clerk, who, being duly sworn, deposes and says:

That all of the records, papers and files of Court and the seals of the District and Circuit Courts of the United State for the Northern District of Florida, at Jacksonville, were destroyed by fire on the night of the 18th of May, 1891.

That after said fire he found the die of the Circuit Court seal among the ruins, and for some time after said fire, this deponent issued writs of the Circuit Court and made an impression of the die on the writs by placing the paper over the same and rubbing the reversed side with some hard substance.

And this deponent says that his recollection is that he made the impression of the seal upon the writ of error issued in this cause in that way; and further deponent saith not.

Subscribed and sworn to before me, this 28th day of March, A. D. 1894. P. WALTER.

O. J. SUMMERS, Notary Public.

SUPPLEMENTAL TRANSCRIPT.

TUUSDAY MORNING, May 19, 1891.

Court met pursuant to adjournment, at the room of the Criminal Court of Duval County, and was formally opened by the crier.

Present, the Hon. Chas. Swayne, District Judge; Jos. N. Strippling, U. S. Attorney; E. C. Weeks, Marshal; Philip Walter, Clerk.

His Honor, Judge Swayne, announced that, as all the books and records of the Court had been destroyed by fire last night, he had met this morning for the purpose of keeping the adjournment regular, and to hear any suggestions that the bar might desire to make, and to make such orders as may be necessary to procure books, etc., to conduct the business of the Court.

* * * * * *

Ordered that this Court do now adjourn until tomorrow at ten o'clock.

WEDNESDAY MORNING, May 20, 1891.

Court met pursuant to adjournment, and was opened by the crier.

Present, the Hon. Chas. Swayne, District Judge; J. N. Strippling, U. S. Attorney; E. C. Weeks, Marshal; Philip Walter, Clerk.

* * * * * *

Ordered that this Court do now adjourn until tomorrow at ten a. m.

THURSDAY MORNING, May 21, 1891.

Court met pursuant to adjournment.

Present, Hon. Chas. Swayne, District Judge; J. N. Strippling, U. S. Attorney; E. C. Weeks, Marshal; Philip Walter, Clerk.

Court was opened in due form by the crier.

* * * * * *

Ordered that this Court do now adjourn until tomorrow at two o'clock p. m.

FRIDAY, May 22, 1891.

Court met pursuant to adjournment.

Present, Hon. Chas. Swayne, District Judge; E. P. Axtell, Assistant U. S. Attorney; Roy P. Moody, Deputy Marshal; P. Walter, Clerk.

Court was opened in due form by the crier.

Ordered that this Court do now adjourn until Monday evening at six o'clock.

MONDAY MORNING, May 25, 1891.

Court met pursuant to adjournment.

Present, the Hon. Chas. Swayne, District Judge; E. C. Weeks, Marshal; Philip Walter, Clerk; J. N. Strippling, U. S. Attorney.

Court was opened in due form by the crier.

* * * * * *

Ordered that this Court do now adjourn until Saturday, May 30, at three o'clock p. m.

SATURDAY, May 30, 1891.

Court met pursuant to adjournment and was formally opened by the crier.

Present, the Hon. Chas. Swayne, District Judge; J. N. Strippling, U. S. Attorney; Phillip Walter, Clerk; Roy P. Moody, Deputy Marshal.

Ordered that until further order of the Court that the Duval County Criminal Court room be the United States Court Building, the same being the building at the northwest corner of Market and Forsyth streets, in the City of Jacksonville.

CHAS. W. HORNE, vs. C. A. and R. T. SMITH. } In Ejectment. Judgment on Verdict.

A verdict for defendant having been rendered by the jury in this cause on the 24th day of January, ~~1891~~, 1891 and at the present term of this Court,

It is now, therefore, ordered by the Court that the defendants, C. A. Smith and R. T. Smith, go hence without delay, and that they do have and recover of and from the plaintiff, Charles W. Horne, their costs herein expended, now taxed at $72.50-100.

* * * * * *

Ordered that this Court do now adjourn until Monday, June 8th, 1891, at twelve o'clock.

MONDAY MORNING, June 8th, 1891.

Court met pursuant to adjournment and was duly opened by the crier.

Present, the Hon. Chas Swayne, District Judge; Joseph N. Strippling, U. S. Attorney; E. C. Weeks, Marshal; Philip Walter, Clerk.

* * * * * *

To E. C. WEEKS, U. S. Marshal:

You are hereby instructed to adjourn the United States Circuit Courts at Jacksonville until the first Monday in August next, and said Courts are hereby accordingly adjourned until that time.

CHAS. SWAYNE, Judge.

MONDAY, August 3, 1891.

Court met pursuant to adjournment.

Present, the Hon. Chas. Swayne, District Judge; Joseph N. Strippling, U. S. Attorney; E. C. Weeks, Marshal; Philip Walter, Clerk.

Court was opened in due form by the crier.

* * * * * *

Ordered that this Court do now adjourn until to-morrow morning at nine o'clock.

TUESDAY MORNING, August 4, 1891.

Court met pursuant to adjournment.

Present, the Hon. Chas. Swayne, U. S. Judge; Joseph N. Strippling, U. S. Attorney; E. C. Weeks, Marshal; Philip Walter, Clerk.

Court opened in due form by the crier.

* * * * * *

Ordered that this Court do now adjourn until to-morrow morning at ten o'clock.

WEDNESDAY MORNING, August 5, 1891.

Court met pursuant to adjournment and was formally opened by the crier.

Present, E. P. Axtell, Assistant U. S. Attorney; R. P. Moody, Deputy Marshal; P. Walter, Clerk.

Ordered that this Court adjourn to to-morrow morning at ten o'clock.

THURSDAY MORNING, August 6, 1891.

Court convened pursuant to adjournment and was opened by the crier.

Present, E. P. Axtell, Assisstant U. S. Attorney; R. P. Moody, Deputy Marshal; P. Walter, Clerk.

The Court was then adjourned until to-morrow at ten a. m.

FRIDAY MORNING, August 7, 1891.

Court convened pursuant to adjournment and was regularly opened by the crier.

Present, E. P. Axtell, Assisstant U. S. Attorney; R. P. Moody, Deputy Marshal; P. Walter, Clerk.

Ordered that the Court adjourn until to-morrow at ten a. m.

SATURDAY MORNING, August 8, 1891.

Court met pursuant to adjournment.

Present, E. P. Axtell, Assistant U. S. Attorney; E. C. Weeks, Marshal; P. Walter, Clerk.

Court was opened in due form by the crier.

There being no further business before the Court, it was adjourned under the order made on the 4th of August, to Monday morning, October 5th next, at ten o'clock.

MONDAY MORNING, October 5, 1891.

Court met pursuant to adjournment at ten o'clock a.m.

Present. Hon. J. M. Strippling, U. S. Attorney; E. C. Weeks, Marshal; Jno. S. Driggs, Deputy Clerk.

Court was opened in due form by the marshal.

MONDAY MORNING, October 31, 1891.

Court met pursuant to adjournment.

Present, the Hon. E. P. Axtell, Assistant District Attorney; C. E. Rogers, Deputy Marshal; P. Walter, Clerk.

Neither of the Judges being present, the Court was adjourned until Monday, November 2d, 1891, at twelve o'clock, noon.

I hereby certify that the foregoing pages, numbered 1 to 7, inclusive, are true and correct copies and transcripts from the Record of the proceedings of the Circuit

Court of the United States for the Northern District of Florida, at the December Term, 1890.

In witness whereof I have hereunto set my hand and the seal of said Court, this 28th day of March, 1894.

~~(Signed)~~

Seal U. S. Circuit Court
Northern Dist'y Fla

PHILIP WALTER,
Clerk.

1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

CHARLES W. HORNE,
PLAINTIFF IN ERROR,
vs.
C. A. AND R. T. SMITH.

No. 672.

In Error to the Circuit Court of the United States for the Northern District of Florida.

Brief of Defendants in Error on Motion to Dismiss the Writ of Error.

OSCAR FOOTE,
Counsel for Defendants.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1894.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

CHARLES W. HORNE, PLAINTIFF IN ERROR,

v.

C. A. AND R. T. SMITH.

No. 672.

In Error to the Circuit Court of the United States for the Northern District of Florida.

Motion to Dismiss Writ of Error.

And now come the said defendants in error, by counsel appearing in that behalf, and move the court to dismiss the writ of error in this cause, because of its irregularity—1st, the writ issued before judgment was rendered; 2d, the bill of exceptions was not settled or filed during the trial term; 3d, the bill of exceptions was signed almost five months subsequent to the issuance of the writ of error and the citation; 4th, the writ of error was not sealed.

And for further reason why the writ of error should be dismissed the defendants say that the value of the matter

in dispute is less than five thousand dollars, and that this court is without jurisdiction.

OSCAR FOOTE,
Attorney for Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

To H. BISBEE, Esquire,
Counsel for Plaintiff.

Please take notice that on Monday, the ninth day of April, 1894, at the opening of the court or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the court thereon.

OSCAR FOOTE,
Counsel for the Defendants in Error.

DISTRICT OF COLUMBIA,
County of Washington, } *ss:*

I solemnly swear that on Saturday, the 17th of March, 1894, I mailed, duly postpaid, a copy of the foregoing motion, together with points of argument, addressed to H. Bisbee of Jacksonville, Fla., who is the attorney for the plaintiff in error.

OSCAR FOOTE,
Counsel for Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR ON THE FOREGOING MOTION.

STATEMENT.

Charles W. Horne, the plaintiff in error and plaintiff below, instituted an action of ejectment in the United

States Circuit Court for the Northern District of Florida to recover certain lands in Brevard county, Florida, described as lot 7, section 23, and lots 1 and 2, section 26, township 29 south, range 38 east, averring that C. A. and R. T. Smith, the defendants, were in possession of said lands, and refused to deliver the same.

The defendants plead to the plaintiff's declaration, denying that they were in possession of the said described lands, and issue was joined.

The jury found for the defendants, and in accordance with the verdict the court rendered judgment in their favor on June 30, 1891. (*Vide* pp. 4 and 27 of Record.)

The plaintiff sued out a writ of error returnable to the Supreme Court of the United States, which writ issued and was served June 8, 1891. (Page 27, Record.)

The bill of exceptions to the judgment above referred to was settled October 30, 1891. (Page 27, Record.)

Points and Authorities.

Attention is directed to the irregularity of a writ of error to review a judgment which was rendered twenty-two days after the issuance of the writ. This cause was removed by service, and the citation was also served prior to the judgment sought to be reviewed. (Page 28, Record.)

The General Term of the United States Circuit Court, as provided by statute, sits at Jacksonville, Fla., on the first Monday in December; at Tallahassee the first Monday in February; and at Pensacola the first Monday in March. This cause was tried in the December term, 1890, at Jacksonville, and the bill of exceptions was settled October 30, 1891, after two terms of the court had intervened.

We maintain that it is an established rule of practice

to require the settlement and filing of a bill of exceptions at the term of court at which the cause was tried in the absence of judicial order extending the time for filing, or a stipulation between the litigants, or an order to file *nunc pro tunc*.

The record fails to show such stipulations or orders.

It was held by Mr. Chief Justice Waite in Miller *v.* Ehlers, 91 U. S. 319.

"As early as Walton *v.* U. S., 9 Wheat. 651, the power to reduce exceptions taken at the trial to form, and to have them signed and filed, was, under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions without an express order of the court during the term or consent of the parties."

See also Mr. Chief Justice Marshall in *Ex parte* Bradstreet *v.* Thomas, 4 Peters, 797. See Walton *v.* U. S. 9 Wheat. 183.

That this bill of exceptions is signed almost five months subsequent to the issuance of the writ of error is, moreover, fatal to it and therefore there is no true bill of exceptions with the record in this court.

On this point we invoke the doctrine laid down by Mr. Justice Miller in Generes *v.* Bonnemer, 74 U. S. 227.

Attention is also directed to the irregularity of the writ, it having no seal.

The record will show that there was no contest in the trial court over the lands embraced by lot 7, section 23, and lots 1 and 2, section 26, township 29 south, range 38 east. The plaintiff contended that the west line of said subdivisions is the Indian river. The defendants offered evidence to prove that the west line of said lots of land is an approved meander line run by a U. S. deputy surveyor,

substantially along a tributary bayou instead of the actual margin of the Indian river, and that the true margin of said river is from three-fourths of a mile to a mile and a quarter westward from said bayou or meander line.

This land lying between the margin of the Indian river on the west and the aforesaid meander line on the east is unsurveyed government land upon which the defendants have settled under the public land laws, and which constitutes the matter actually in dispute.

The valuation set out in plaintiff's declaration is directed to and embraces lands not claimed by the defendants.

The record fails to show that the matter actually in dispute is of greater value than $5,000, and the burden is upon the plaintiff to show that the amount to give jurisdiction in this court was involved in the trial court.

The defendants below offered evidence only to show that they are rightfully in possession of the land between the approved meander line and the true margin of the river, and the judgment was for the defendants.

Mr. Chief Justice Waite held in Green *v.* Fisk, 103 U. S. 487, to make a case for this court, "The appellant must show affirmatively that more in pecuniary value than our jurisdictional requirement has been adjudged against him."

See alo McCarthy *v.* Povost, 103 U. S. 337.

(In the appendix hereto will be found a certificate of the county clerk showing the tax valuation of the land described by lots for the year 1891, and twenty-seven affidavits showing the value of the land in dispute.)

Plaintiff in the *ad damnum* claims $5,000 as mesne profits. It will appear that the amount named is merely colorable and far beyond the amount of a reasonable expectation of recovery. We also show that the land in dispute is wild woodland, non-productive and having no rental value.

See last affidavit, Appendix.

The question of mesne profits was not tried in the court below, and defendants offered no evidence touching the matter.

In Gorman *v.* Havird, 141 U. S. 717, Mr. Justice Brown held that "it is true as a general rule that where judgment goes for the defendant, the amount of the plaintiff's claim is the test of jurisdiction; but this rule is subject to the qualification that the demand shall appear to have been made in good faith for such amount. If it appear clearly from the whole record that under no aspect of the case the plaintiff could recover the full amount of his claim, this court will decline to assume jurisdiction."

It is our contention that the specific amount claimed by the plaintiff as mesne profits is excessive, and that such good faith as is contemplated in the decision just quoted does not appear in the record, and we offer the appended affidavits to rebut such assumption.

On these several points we respectfully maintain that the writ of error should be dismissed.

OSCAR FOOTE,
Counsel for Plaintiff in Error.

APPENDIX.

I, A. A. Stewart, clerk of the Circuit Court for Brevard county, Florida, do hereby certify that lot 7 of section 23 and lots 1 and 2 of section 26, all in township 29 south of range 38 east, were assessed in 1891 at a valuation of $1,180.00, as appears by the original tax book for the year 1891, filed in my office on November 2d, 1891.

Witness my hand and the seal of the Circuit Court this 13th day of March, A. D. 1894.

[SEAL.] A. A. STEWART,
Clerk of the Circuit Court.

SUPREME COURT OF THE UNITED STATES.

CHARLES W. HORNE
v.
C. A. and R. T. SMITH. } *Ejectment.*

Before me personally came W. R. Sanders, tax assessor for Brevard county, Florida, and Enoch W. Hall, tax collector for Brevard county, Florida, and each, being first duly sworn, made oath as follows: We are well acquainted with the land occupied by C. A. and R. T. Smith at Mullet Creek, in this county, being in sections 23 and 26 of township 29 south of range 38 east, and in our opinion the value of said land does not exceed thirty dollars per acre for such as is high and dry and fit for cultivation, which comprises about one hundred acres. The balance

of said land is subject to overflow and comparatively worthless, not worth more than one dollar per acre.

W. R. SANDERS,
Tax Assessor Brevard County.

E. W. HALL,
Tax Collector.

Sworn to and subscribed before me this 9th day of March, A. D. 1892.

[SEAL.] HENRY B. ARCHIBALD,
Notary Public.

SUPREME COURT OF THE UNITED STATES.

CHAS. W. HORNE
v.
C. A. & R. T. SMITH. } *Ejectment.*

Before me personally came R. B. Burchfiel, and, being duly sworn, made oath as follows: I am county surveyor of Brevard county, Florida; I have surveyed lot 7, sec. 23, and lots 1 and 2, sec. 26, of T. 29 S., R. 38 E., belonging to Chas. W. Horne, and the unsurveyed U. S. land lying between this land and the Indian river, occupied by the defendants C. A. & R. T. Smith, as settlers. There is about 360 acres of land between the Government meander line and the actual margin of the river. Of this about 100 acres is good land, the balance is marsh or savannah incapable of drainage, and valueless.

The defendants Smith occupy the 100 acres of good land. I have surveyed their place and located their improvements. The land in question is shown by the following plat, which corresponds with my survey. [Plat drawn at this point.]

I am also acquainted with the selling price of lands in the county, and the market value of the 100 acres occupied by the Smith brothers is not over $30 per acre. The balance of the land not occupied by the Smith brothers is not worth over State prices of $1 per acre, and I do not regard it as worth this price.

R. B. BIRCHFIEL.

Sworn to and subscribed before me December 16, A. D. 1891.

[SEAL.] F. CASS ALLEN,
Notary Public.

SUPREME COURT OF THE UNITED STATES.

CHAS. W. HORNE
v. } *Ejectment.*
C. A. and R. T. SMITH.

Before me personally came Walter Good and Jas. T. Hogg, copartners under the firm name of Good & Hogg, and, being duly sworn, made oath as follows: We are engaged in the business of selling real estate upon the Indian river. We are acquainted with the character and value of lands along the river and with lot 7, sec. 23, and lots 1 and 2, sec. 26, T. 29 S., R. 38 E., and with the unsurveyed lands just to the west of said lots, lying between them and the river. There is a good deal of waste land in said unsurveyed land, and the market value thereof is not more than $30.00 per acre for the one hundred acres thereof occupied by the defendants C. A. and R. T. Smith, or $3,000.00 for the entire tract in controversy between Chas. W. Horne and said Smith brothers.

GOODE & HOGG.

Sworn to and subscribed before me this 10th day of December, 1891.

[SEAL.] LARUE P. ELY,
Notary Public.

SUPREME COU T OF THE UNITED STATES.

CHAS. W. HORNE
v.
C. A. and R. T. SMITH. } *Ejectment.*

Before me personally came John Baird, and, being duly sworn, made oath that he owns land near and of similar quality to the unsurveyed land lying between lot 7, sec. 23, and lots 1 and 2, sec. 26, T. 29 S., R. 38 E., comprising 100 acres, occupied by C. A. and R. T. Smith, and claimed by Chas. W. Horne; that he is well acquainted with the value of such land, and recently sold about eighty acres of his own land of similar quality and as well located for the sum of $1,875, and considers said price a fair value therefor.

That he is well acquainted with the land in controversy between Chas. W. Horne and C. A. and R. T. Smith and has been all over the same, and the value thereof is not in excess of the sum $30 per acre, or $3,000 for the 100 acres occupied by the said C. A. and R. T. Smith.

JOHN V. BAIRD.

Sworn to and subscribed before me this 7th day of December, 1891.

[SEAL.] HENRY HANAW,
Notary Public, Mobile County, Alabama.

Subscribed and sworn to in the presence of —
FREDK. G. BROMBERG.
E. H. BIXLER.

SUPREME COURT OF THE UNITED STATES.

CHAS. W. HORNE
v.
C. A. & R. T. SMITH. } *Ejectment.*

Before me personally came L. P. Ely, and, being duly sworn, made oath as follows: I am engaged in the business of selling real estate upon the Indian river. I am acquainted with the character and value of lands along the river and with lot 7, sec. 23, and lots 1 and 2, sec. 26, T. 29 S., R. 38 E., and with the unsurveyed lands just to the west of said lots lying between them and the river. There is a good deal of waste land in said unsurveyed land, and the market value thereof is not more than $30 per acre for the one hundred acres thereof occupied by the defendants C. A. & R. T. Smith, or $3,000 for the entire tract in controversy between Chas. W. Horne and said Smith brothers.

LA RUE P. ELY.

Sworn to and subscribed before me this 4th day of December, 1891.

[SEAL.] JAMES T. HOGG,
Notary Public.

IN SUPREME COURT OF THE UNITED STATES.

CHAS. W. HORNE
v.
C. A. & R. T. SMITH. } *Ejectment.*

The undersigned, settlers and land owners in the neighborhood of secs. 23 and 26, T. 29 S., R. 38 E., in Brevard county, Florida, having been first duly sworn, do make oath as follows:

We are well acquainted with the land occupied by C.

A. & R. T. Smith, in front of lot 7, sec. 23, and lots 1 and 2, sec. 26, of T. 29 S., R. 38 E., and which is claimed by Chas. W. Horne, the owner of the above-described lots. We are also acquainted with the value of the land in this vicinity and its market price, and the 100 acres occupied by C. A. & R. T. Smith is not worth over $30 per acre. The balance of the outlying land in front of Chas. W. Horne is mostly salt marsh and worthless.

ROBERT MORROW,
Chairman Board Co. Commissioners.
JAMES E. BOWMAN, *Sheriff.*
E. P. BRANCH.
N. DOWNEY.
J. F. BERGER.
J. H. PHILLIPS.
E. C. THOMAS.
W. J. NESBITT.
JOSEPH F. CHASE.
R. L. McFADDEN.
J. B. MAYNARD.
M. G. ELLIS.
C. F. LATHAM.
EDWIN NELSON.
WM. DOUGLASS.
CHAS. WILLIAMS.
J. E. RAINY.
B. A. CIRCLE.
WM. I. METCALF.
F. C. PRANGE.
H. C. STARCK.

Sworn to and subscribed before me, in the month of December, 1891, except as to Robert Morrow, James E. Bowman, and C F. Latham.

[SEAL.] LA RUE P. ELY,
Notary Public.

Sworn to and subscribed before me by Robert Morrow and Jas. E. Bowman.

[SEAL.] GEO. N. ROBBINS,
Notary Public.

IN SUPREME COURT OF THE UNITED STATES.

CHAS. W. HORNE,
Plaintiff in Error,
v.
C. A. & R. T. SMITH,
Defendant in Error.

Affidavit as to Mesne Profits.

Before the subscriber, clerk of the circuit court for Brevard county, Florida, personally came Charles A. Smith, one of the defendants in the above-entitled cause, and, being first duly sworn, made oath as follows:

My brother, R. T. Smith, and this deponent settled upon the land in controversy in this suit in March, 1887. We built a palmetto shelter in which we lived, and later built a frame house 14′ x 16′, which cost us about $75.00. The land was entirely wild and the country very sparsely settled. There was only one family within ten miles either to the north or south of us on that side of the river. No wild land was ever rented or has ever been rented in that locality, and the land we occupied had no rental value. The first year we cleared ½ acre but did not plant it. The winter of 1888 and 1889 we had about three acres cleared and planted in beans and tomatoes. Our net receipts on this crop, after paying freight charges, were sixty dollars, which was the proceeds of our four months of labor in planting and cultivating the patch. In the season of 1889 and 1890 there were

three of us at work for seven months enlarging the clearing, planting, and cultivating. We had another place, not on this land, which we worked at the same time. We received from the stuff shipped from the land in controversy, after paying freight charges, one hundred and fifty dollars as the result of our labor. In the year 1890 and 1891 we had two men hired for five months whom we paid $16.00 per month and board, amounting in all to $22.00 per month. We also worked ourselves. We paid the men $220.00. We received from the crop that year, over and above the freight charges, seven hundred dollars. And deducting wages paid the men, we received $480.00 ourselves for our labor of seven months each. During the four years we ran behind on the place some six hundred dollars.

At the time the writ of error was sued out, in the spring of 1891, we had made a loss of six hundred dollars on the land; that is, we failed to make a living on the land by that much.

It was wild land; had no rental value, and there were no mesne profits. There was no evidence of mesne profits introduced at the trial in Jacksonville.

Since the spring of 1891 the land has not paid us as much as we can get by the month working for others.

CHARLES A. SMITH.

Sworn to and subscribed before me this November 18, 1893.

[SEAL.]

A. A. STEWART,
Clerk of Circuit Court.

Office Supreme Court U. S.
FILED.
APR 9 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

CHARLES W. HORNE,
PLAINTIFF IN ERROR,
v.
C. A. AND R. T. SMITH.
} *No.* 672.

In Error to the Circuit Court of the United States for the Northern District of Florida.

Defendants in Error Oppose the Motion to Continue the Motion to Dismiss.

It is the contention of plaintiff's counsel that the motion to dismiss should be continued until the next term for the reason that the whereabouts of the plaintiff is unknown, and that his presence and advice is essential toward establishing the value of the property in controversy.

The plaintiff resides in the State of Ohio, as appears in the declaration, page 2 of the record, and obviously would have no better knowledge of values of lands in Florida than persons living in the latter State and near the land involved. Plaintiff's counsel, it appears, is a resident of that quarter of Florida in which the land is located, and is in a far better position to know who could testify as to its value than the plaintiff himself.

We maintain that neither the presence nor advice of the plaintiff is essential to secure affidavits or county officers' certificates to show the value of the land in controversy.

It will appear that plaintiff's counsel had due notice of our motion to dismiss on the ground that the amount involved does not give this Court jurisdiction, and that he was duly served with copies of the affidavits in support of our motion three weeks before the motion was submitted.

We contend that on such notice plaintiff's counsel has had ample time to present affidavits of value of the land involved, and that no extension of time is contemplated in the citation he gives. (Grace Girdlet, 6 Wall. 441.)

We therefore respectfully maintain that the motion to continue should be denied.

OSCAR FOOTE,
For Defendants in Error.

FILED
MAY 2 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

CHARLES W. HORNE,
PLAINTIFF IN ERROR,
VS.
C. A. AND R. T. SMITH.

No. 341.

In Error to the Circuit Court of the United States for the Northern District of Florida.

Brief of Defendants in Error.

GEO. M. ROBBINS,
Counsel for Defendants.

TITUSVILLE, FLORIDA:
ADVOCATE PRINTING HOUSE.
1894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

CHARLES W. HORNE,
PLAINTIFF IN ERROR,
VS.
C. A. AND R. T. SMITH.

No. 341.

In Error to the Circuit Court of the United States for the Northern District of Florida.

Brief for Defendants in Error.

Charles W. Horne, the plaintiff in error and plaintiff in the court below, instituted an action of ejectment in the United States Circuit Court, for the Northern District of Florida, to recover certain lands in Brevard County, Florida, alleged to be included within the lines of lot 7, section 23, and lot 1 and 2, section 26, township 29 south, range 38 east; said lands being situated as shown in the sketches at page 45 of the record. The point in issue, was, whether the land in possession of defendants, formed part of the lots described. The jury found for the defendants, and judgment was entered accordingly.

The inside lines of the sketches represent the meander line of the United States Survey. The deposition of R. B. Burchfiel, the County Surveyor and a witness for the plaintiff (Vide pp. 30, 33 and 34 Rec.,) shows that this meander runs along a slough or swale at times, filled with water from the Indian River. See also, testimony of Smith, (pp. 47 and 48 Rec.) It will be noted that the house and clearing of the defendants, lie west of a line coincident with the east line of lot 6 or the west line of lot 7 produced, or west of the center of section 26. (See Surveyor's deposition, pp. 32 and 33 Rec.)

Points and Authorities.

The meander line of lots 7, 1 and 2 was established at the segregation line between the dry and the swamp or overflowed land. In such cases the regulations established by the General Land Office provide, "In cases where such meander lines were formerly established at the segregation line between dry and swamp or overflowed lands, new and proper meander lines may be estab-

lished under the direction of the surveyor general, and the township and section lines extended over such swamp or overflowed lands, and the corners established as hereinbefore provided, in order that the plats and field notes of surveys may show the actual facts in the case." (Manual of Surveying instructions for the Survey of the Public Lands of the United States and Private Land Claims. Prepared in conformity with law under the direction of the Commissioner of the General Land Office, January 1st, 1890 No. page 34, section 4.)

The swamp and overflowed lands beyond the segregation line meandered by the government survey, passed to the State of Florida by the Act of Congress of September 28th, 1850. (See Wright vs. Roseberry, 121 U. S., 488), long before the sale of the upland lots by the government.

It is admitted that it is the general rule, that the entryman of a water lot by the plat, takes to the water. But we contend that he takes to the water actually meandered, in this case to water of the savannah, and not to the shore of the Indian River, a mile beyond.

Glenn vs. Jeffrey, Iowa, 39 Northwestern 160.
Lammers vs. Nissen, 4, Neb. 245.
Warville on Abstracts, p. 143 Sec. 5.

The rule also has its limits, and where, as in the present case, it appears (see testimony of Surveyor and Smith, pp. 30 and 47 Record), that there is a mile of land between the meander line and the river, and at defendant's place there are live oak trees four feet in diameter, negativing the idea of accretion —this breaks the rule.

In the case of Mitchell vs. Smale (May 11th, 1891), this court uses the following language in qualifying the general rule there followed: "We do not mean to say, that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud; in which case the government would have the right to recall the survey, and have it corrected by the courts or in some other way. Cases have happened in which, by mistake, the meander line described by the surveyor in the field notes of his survey, did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the government."

In the present case the mistake was one, so common in the older surveys, that, of running the meander along the segregation line between the uplands and the marshy lands bordering the river; that the land department has made the regulation for the correction of such surveys quoted at the beginning of this brief.

The determination as to whether, under the evidence, this case was outside of the general rule, called for the judgment of the court below, and the exercise of its discretion in this regard should be sustained. (See also, Lally et. al. vs. Rossman, 51 N. W., 1132, where it is held, that, if the grantee of a fractional lot does not find the water course as called for by his patent, he may go only as far as the next 8th line to locate his boundary. This in connection with testimony of the surveyor on pages 32 and 33 of the Record.)

The first assignment of errors appears to be to the introduction of testimony offered by the plaintiff himself. (See testimony of the Surveyor at page 28 of the Record, and the Surveyor's map, page 43; also defendant's pleas which

had been struck by the court, but were introduced in evidence by the plaintiff himself, pages 42 to 46 of Record.

The second assignment is to the admission of the testimony of C. A. Smith (page 47 Record), to contradict the facts as set forth by the official plat. If this was error, it was immaterial, as plaintiff had already, by his surveyor, and by our pleas proved all that was material in Smith's testimony. We do not admit, however, that the official plat is conclusive evidence of the situation and contour of lands shown on it as against these defendants.

The court properly refused the charges requested in the 3rd and 4th specifications of error, as they do not state correct propositions of law. Evidence has been received in all the cases to show the contour and lay of the land with reference to the meander and other lines of the plat.

> Hardin vs. Jordan, 11 S. Ct. 808, 140 U. S. 371.
> Whitney vs. Detroit Lumber Co., Wis., 47 N. W. 425.

There is no irrebutible presumption that the official plats of the United States surveys, show accurately the lands surveyed. It is competent to show the facts with reference to the land and the official plat of it. This having been done, it is for the court to determine whether lands lying without the meanders belong—as a matter of law—to the adjoining lots, or whether they have been omitted from the public surveys by error or fraud on the part of the surveyors, and remain unsurveyed lands of the United States. (47 N. W. 425.)

We think that the charge of the court, as given in 5th assignment of errors, correctly states the limitations of the general rule as applied to the facts of this case.

Lot 7, section 23, is an "Eighty" made fractional by the supposed interference of water. If the water is not found the purchaser of the lot would be entitled to the entire "Eighty," and would not be confined to the 73.05 acres actually paid for. The same is true as to lots 1 and 2 of section 26. (Whitney vs. Detroit Lumber Co., Wis., 47 N. W. 425. Lally et. al. vs. Rossman, 51 N. W. 1132), unless it be held, that, as the meander actually followed the waters of a slough, that this latter would be the boundary. (Glenn vs. Jeffrey, and Lammers vs. Nissen, supra).

In neither case would the lots as extended, embrace lands in the occupation of the defendants. (See pages 32 and 33 of Record, testimony of the Surveyor.)

None of the decided cases that we have found, go so far as to hold, that, the purchaser of a fractional lot, less than 80 acres, can extend his lines so as to take in from a mile to a mile and a quarter of land, intervening between his lots and a river. The trial judge made no error in drawing the line at such a case, and confining the application of the rule to smaller areas, where, owing to the meanders cutting off points and extending across coves, etc., slight projections and excesses in area are thrown in because the fractional lots are as likely to be scant in area as to measure over. In such cases, coves being measured in and points measured out, a fair average of the land embraced in the fractional lots in the township, is obtained, and the water and not the meander, is the real boundary. But where the surveyors run a meander along a slough or line of segregation between the uplands and swamp and overflowed lands, thus

omitting from their computations of area a body of land comprising some six hundred acres (plaintiff's evidence, pages 43 and 44 Record); the purchase of the fractional lots adjoining the slough or segregation line, will not include the six hundred acres thus omitted, but this body remains the property of the government to be subsequently surveyed and disposed of. (Warville on Abstracts, page 143, section 5.)

On these several points we respectfully maintain that the judgment of the court below should be affirmed.

Geo M Robbins

Counsel for Defendants in Error.